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Supreme Court, U.S.
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No.

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In the Supreme Court of the United States

JEFFREY N. MEHLER AND MARY S. RUSSELL,

Petitioners,

v.

THE TERMINIX INTERNATIONAL COMPANY, L.P.,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners Jeffrey N. Mehler and Mary S. Russell received termite extermination services from the Terminix International Company, L.P. at their home. Terminix injected termiticide near the drinking well and punctured an oil line, releasing 800-1,800 gallons of oil. The oil contaminated the home, land, drinking water, a public road and neighbors' properties, causing the Mehlers to suffer significant economic damages, liability to third parties, and personal injuries. Terminix submitted the Mehlers' claim to the American Arbitration Association for Commercial Arbitration, citing an arbitration clause in a Terminix guarantee against future termite infestations. The arbitration clause does not disclose the $7,000 AAA filing fee or the jury trial waiver. It also requires waiver of all claims for "indirect, special, or consequential" damages, where such damages could be enormous.

The questions presented are:

Whether the Second Circuit, consistent with the Federal Arbitration Act, may apply the Act's presumption favoring arbitration so as to preempt general principles of state contract law.

Whether the Second Circuit, contrary to the rulings of five other circuits, erred in holding that the arbitration agreement is not unconscionable.

RULE 14.1 STATEMENT

This statement is omitted as the names of all parties appear in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jeffrey N. Mehler and Mary S. Russell respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is dated February 24, 2000, and it is reported at 205 F.3d 44. App., *infra,* 1a-21a. The opinion of the district court is dated September 28, 1998, and it is unreported. App., *infra,* 22a-39a.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2000. A petition for rehearing/rehearing *en banc*/remand was denied on January 10, 2001. App., *infra,* 40a-41a. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act provides in relevant part that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

STATEMENT

At issue in this case is whether, pursuant to the Federal Arbitration Act ("FAA"), a federal court may properly apply the FAA's presumption favoring arbitration so as to preempt general principles of state contract law that would preclude arbitration in a specific case. Also at issue is whether the Second Circuit, in conflict with the decisions of five other circuits, erroneously concluded that petitioners' unconscionability claims have no merit.

The Second Circuit's decision here is emblematic of the federal courts' expanding and insidious application of the federal presumption in favor of arbitration to trump state contract law. Proceeding inconspicuously, but with grave effect, the federal courts' preemption of state contract law through proarbitration construction of contracts has gone largely uncriticized. This trend has not caused disagreement among the circuits – nor would it be expected to. To many courts, this Court's holdings have legitimized an activist proarbitration approach to contract construction. Further, few courts can withstand the practical pressures to use the FAA's presumption of arbitrability as a docket-clearing device. Justices Rehnquist, Thomas, O'Connor, Scalia and Stevens have criticized this Court's *overt* expansion of the FAA to preempt certain state laws. Yet, despite agreement on the Court that the express language of the FAA preserves the role of generally applicable principles of state contract law, its *covert* preemption is proceeding at pace.

The Second Circuit's ruling in this case is legally erroneous. The notion that a federal court can disregard a contract's clear and unambiguous terms and resort to its own "reasonable reading" of a contract so as to effect the preemption of general principles of state contract law and order arbitration is inconsistent with the plain language and legislative history of the FAA. It also raises substantial constitutional concerns, under the Seventh Amendment and this Court's waiver jurisprudence, where a federal court's preemption of state contract law validates the nonconsensual termination of the constitutional right to a jury trial as a matter of contract interpretation.

Both the District Court and the dissenting judge on the Second Circuit's panel correctly applied general state contract law principles. Both concluded, consistent with the analysis by Professor of Law George Priest, that no agreement to arbitrate the parties' dispute was entered into. As the dissent notes, the Second Circuit's decision to apply the federal presumption in favor of arbitrability to preempt state contract law is contrary to law. Further, five circuits have concluded that contracts with terms similar to, or less onerous than, those in the arbitration clause at issue here are unconscionable.

Given the split among the circuits on the issue of unconscionability and the statutorily and constitutionally untenable basis for the Second Circuit's preemption of principles of state contract law in favor of arbitration, it is time for this Court to address the questions presented. Review of the Second Circuit's expansive application of federal authority in lieu of state contract law in this case is especially appropriate and necessary. Congress intended states to retain authority over general contract principles. Yet so expansive is the Second Circuit's application of the federal presumption in favor of arbitrability that it is difficult to imagine any dispute that would not be referable to arbitration so long as there is some writing signed by the parties at some point in time in reference to some matter that contains an arbitration clause.

The now ubiquitous presence of arbitration clauses in form contracts of every kind means that questions of the parties' intent and consent, which are expressly reserved for resolution under state law, are now subject to the federal courts' unlimited authority to impose their proarbitration policy preferences on contracting parties. Federalization of the rules of contract interpretation and construction is not what Congress had in mind when it adopted the FAA, and the express language of the Act does not permit it.

A. Statutory Scheme and Role of Courts

The FAA provides that written arbitration clauses are to be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A court may order arbitration "in accordance with the terms of the agreement," but only "upon being satisfied that the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4. This Court has interpreted the language of the FAA to express Congress's clear intent to preserve generally applicable principles of state contract law under the FAA. *Circuit City Stores, Inc. v. Adams*, ___ U.S. ___, 2001 WL 273205, *2 (2001); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S.

468, 477 (1989); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 36-37 (1988) (Scalia, J., dissenting); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

Once a court determines both that a contract governs the claims at issue and that an enforceable agreement to arbitrate exists, it then determines whether the dispute falls within the scope of the arbitration clause. If the scope of the arbitration clause is ambiguous, courts are directed to apply the "body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate" and to presume arbitrability. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983). *See also, Volt*, 489 U.S. at 475; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Petitioner challenges the Second Circuit's reliance on the federal presumption in favor of arbitrability to justify its disregard for the clear and unambiguous terms of the contract and for cardinal principles of state contract law as the legally improper basis for ordering arbitration in this case.

B. Termite Treatment Services and Termite Protection Plan

In July 1996, Jeffrey N. Mehler and Mary S. Russell (the "Mehlers") authorized the Terminix International Company, L.P. ("Terminix") to provide termite treatment services at their home in Deep River, Connecticut. The Mehlers also purchased Terminix's Termite Protection Plan, which is a written guarantee against future termite infestation that becomes effective after treatment. App., *infra,* 42a-47a. During the treatment services, Terminix caused a massive oil release and injected termiticide close to the Mehlers' drinking water well. The Mehlers claimed damages and personal injuries from chemical exposure totaling over $1,000,000, and they asserted claims for punitive damages under the Connecticut Unfair Trade Practices Act.

The Termite Protection Plan is a guarantee against future termite infestations. It expressly excludes from its coverage damages occurring at the time of treatment. App., *infra,* 42a. Although the Protection Plan requires arbitration, it does not include any notice of the waiver of the constitutional right to a jury trial (and the companion right to a judicial forum) nor does it disclose the $7,000 fee for filing a claim with the American Arbitration Association ("AAA"). App., *infra,* 43a. The arbitration clause also imposes a waiver of claims for "indirect, special, or consequential" damages.[1] *Id.*

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[1] The Termite Protection Plan's arbitration clause provides:

> 9. ARBITRATION. The purchaser and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association. The decision of the arbitrator shall be final and binding resolution of the disagreement which may be entered as a judgment by any court of competent jurisdiction. Neither party shall sue the other where the basis for the suit is this agreement other than for enforcement of the

Terminix claims that its Termite Protection Plan's arbitration clause extends to the claims arising from the prior treatment services at issue here. The Mehlers claim that the treatment services occurred prior to the effective date of the Termite Protection Plan, and that the clear and unambiguous language of the Termite Protection Plan drafted by Terminix precludes retroactive coverage of claims arising from the initial treatment. In support of their analysis, the Mehlers provided the affidavit of Professor George L. Priest, of Yale Law School, providing a contract and economic analysis of the Termite Protection Plan. App., *infra*, 48a-79a.

C. Petitioners' Challenge of Arbitration and the District Court's Decision

On October 30, 1997, Terminix filed the Mehlers' claim against Terminix with AAA for commercial arbitration. On November 12, 1997, the Mehlers sent a letter to Terminix by telefax and certified mail voiding the Termite Protection Plan on the grounds that it is unfair, oppressive and unconscionable. App., *infra*, 82a-83a. Also on November 12, 1997, the Mehlers filed an action in the U.S. District Court for Connecticut, challenging the validity and enforceability of the Termite Protection Plan and seeking compensatory and punitive damages.

> arbitrator's decision. In no event shall either party be liable to the other for indirect, special or consequential damages or loss of anticipated profits.

App., *infra*, 43a.

On November 13, 1997, the Mehlers filed an "answering statement" with AAA, to which they attached a copy of the complaint filed in court. The statement asserts that AAA lacks jurisdiction over the Mehlers' claims because the treatment falls outside of the scope of the contract. The Mehlers affirmatively voided the agreement and the contract is invalid and unenforceable under Connecticut law. In subsequent correspondence with AAA, through the present, the Mehlers have continued to assert their ongoing challenge to AAA's jurisdiction.

On September 28, 1998, the District Court ruled on Terminix's motion to dismiss or to stay pursuant to the FAA. After engaging in a thorough state contract law analysis, the District Court held:

> [T]he language of this contract is clear and unambiguous . . . that the agreement contained therein relates solely to future protection against any new termite damage to the plaintiffs' home – for a period of two years beginning August 1, 1996. The plaintiffs' claims in this lawsuit all stem from the initial extermination services rendered by Terminix on July 19 and July 24, 1996. As a consequence, these claims do not fall within the Termite Protection Plan's arbitration clause because they do not "arise out of or relate to" the future protection of the plaintiffs' home from any "new subterranean termite damage."

App., *infra*, 33a. The District Court reasoned that "[c]learly, work that must be completed before a contract can become effective cannot be within the scope of that contract, unless there is some express provision specifying how that is to be so." *Id.* The court concludes, "[h]ere, there is none." *Id.* "While it is clear now what sort of language [Terminix] wishes it had written in its Termite Protection Plan, it is equally clear that such language is not to be found there." *Id.*

D. The Second Circuit's-Ruling

The Second Circuit's majority reversed the District Court, holding that the Termite Protection Plan is a "unified contract" for extermination and continual protection. App., *infra,* 8a. The majority reaches this conclusion by observing that the contract refers to itself (in a box in the upper right hand corner of the front page) as a service order and a Termite Protection Plan, and by noting that "The Entire Agreement" is defined as the service order, the Termite Protection Plan and the inspection graphs. App., *infra,* 9a.

The majority concludes that even if the contract were not viewed as a unified contract encompassing the initial treatment services, the federal presumption in favor of arbitrability would lead to arbitration here in any event. App., *infra,* 12a. The majority does not address the rules of contract interpretation relied upon by the District Court and the dissent, and it dismisses, without analysis, the Mehlers' and the State of Connecticut's claims that the arbitration agreement is unconscionable and unenforceable. App., *infra,* 14a.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the Second Circuit's decision provides a clear example of a federal court applying an improper, result-oriented contract analysis under the FAA and misapplying the federal presumption of arbitrability so as to preempt state contract laws. It is this type of misuse of the federal power conferred on courts by the FAA that is effecting the subtle but expanding preemption of state contract law under the FAA.

The Second Circuit's decision in this case is erroneous as a matter of statutory interpretation and contract analysis. This decision seriously infringes on the rights expressly reserved by Congress for the states in our system of federalism. It effectively nullifies state laws protecting contracting parties, including consumers and others with unequal bargaining power, and it extinguishes petitioners' rights under state contract law.

Granting review here, even if it leads to reversal in this case, would leave intact the vast majority of arbitration agreements while curbing the impulse of federal courts to engage in result-oriented contract interpretations. Arbitration agreements in the securities context, for example, generally do not have the same temporal issues as exist in the contract here. Additionally, most arbitration agreements today disclose jury trial waivers. The arbitration agreement at issue is an extreme example of one-sidedness, creation of unfair surprise, and imposition of oppressive terms.

I. THE SECOND CIRCUIT ENGAGED IN AN UNAUTHORIZED PREEMPTION OF STATE CONTRACT LAW

A. The Second Circuit's Decision Infringes on Traditional State Powers and the Role Expressly Preserved for the States by the FAA

1. Passage of the FAA was motivated first and foremost by congressional desire to enforce arbitration agreements into which parties had entered. *Volt,* 489 U.S. at 478 *(citing Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 220 (1985)). The FAA was enacted to force courts to place arbitration agreements upon the same footing as other contracts, *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24 (1991) (*citing Dean Witter,* 470 U.S. at 219-20 and n.6; *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 510 n.4, (1974)), and to make arbitration agreements only as enforceable as other contracts, but not more so. *Volt,* 489 U.S. at 478 (*quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404 n.12 (1967)). Clearly, Congress's goals in enacting the FAA can only be achieved if FAA-governed contracts are construed under the same body of state contract law as other contracts.

Issues of contract, including a contract's validity, are nearly always governed by state law. *Stewart,* 487 U.S. at 22. "It is simply contrary to our system that such an issue should be wrenched from state control in absence of a clear conflict with federal law or explicit statutory provision." *Id.* at 36. Congress intended the FAA only to preempt state antiarbitration laws – not generally applicable principles of state contract law. *Circuit City,* 2001 WL 273205, at *9.

2. Here, the majority applies an improper result-oriented, proarbitration contract analysis to justify its reversal of the District Court. The majority ignores some of the most basic principles of contract interpretation, substitutes its own "reasonable reading" of the contract for clear and unambiguous terms, creates its own new proarbitration rule of "unified contract," and applies the federal presumption in favor of arbitration to effectively preempt state contract law.

For example, it is fundamental to contract interpretation that express terms are given greater weight than course of performance or course of dealing, and that specific and exact terms are given greater weight than general language. RESTATEMENT (SECOND) OF CONTRACTS § 203 (1979). The Termite Protection Plan states specifically that it goes into effect "upon completion" of the work. App., *infra*, 42a. A later-issued certificate indicates that it becomes effective on "08/01/96." App., *infra*, 47a. Thus, the effective date clearly excludes the initial treatment on July 19 and 24, 1996. In addition, the contract specifically excludes "damage existing at the inception date," and limits Terminix's obligations under the contract to providing service and a guarantee relative to *future* termite infestation. App., *infra*, 42a.

Applying the principle of Connecticut contract law that contracts do not typically apply retroactively in the absence of an express term in the agreement to do so, both the District Court and the dissenting Second Circuit judge concluded that the Termite Protection Plan does not cover the relevant July 19 and 24, 1996 period. Both federal judges concluded that the express and explicit terms of the contract are clear and unambiguous. App., *infra,* 39a and 14a.

The majority, on the other hand, claims that the District Court's analysis (and, by implication, the dissent's analysis) is "flawed" because it did not consider seven additional facts to determine the contract's scope.[2] App., *infra,* 9a. The majority provides no support, in the face of contrary Connecticut contract principles and the clear terms of the agreement as to the contract's scope, for its seven-factor analysis.[3]

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[2] The seven facts are: 1) the date the contract was signed, 2) the language in a small box on the first page that says the contract (which is boldly encaptioned "Termite Protection Plan") is a service order and Termite Protection Plan, 3) inspection graphs that are attached, 4) "Entire Agreement" is defined as the service order, Termite Protection Plan and inspection graphs, 5) the fact that the Mehlers signed a "completion certificate," 6) a reference in the Mehlers' initial complaint (which challenges the contract) to a single written contract, and 7) the single payment to Terminix. App., *infra,* 9a.

[3] Neither of the two cases cited by the majority support its approach. The court misconstrues the holding in *Oldroyd v. Elmira Savings Bank,* 134 F.3d 72, 77 (2d Cir. 1998), to make the unprecedented claim that it justifies using the Mehlers' complaint challenging the written contract to somehow alter the clear and express terms of the contract. It also cites *Crowther v. Gerber Garment Tech., Inc.,* 513 A.2d 144, 149 (Conn. App. 1986), as providing support for its self-styled seven-factor test. As with *Oldroyd, Crowther* is not on point. It holds only that where it is unclear whether the parties extended an employment contract into the future, the court looks to their course of conduct. In contrast, here, Connecticut law requires that any intent to apply a contract retoactively must be clear on the face of the agreement.

Giving no weight to clear and specific terms, the majority relies on ambiguous language in the contract (see the court's second, third and fourth factors in footnote 2) to justify its conclusion that the prior treatment on July 19 and 24, 1996 falls within the contract's scope. Although the majority does not explain the basis for its "unified contract" approach, presumably it is based on the general rule that contracts should be interpreted as a whole. *See* RESTATEMENT (SECOND) OF CONTRACTS § 203, cmt. b (1979). The court applies this rule improperly, however, by ignoring the exception to the rule that states that the rule does not apply to standardized contracts. App., *infra,* 8a. The reason the rule is inapplicable to form agreements such as the Termite Protection Plan is that, unlike negotiated agreements, standard forms often include inappropriate, overlapping, redundant or meaningless provisions. RESTATEMENT (SECOND) OF CONTRACTS § 203, cmt. b (1979).

The majority fashions its own "reasonable reading" standard, ignoring terms that are clear on the face of the contract.[4] App., *infra,* 16a. In this way the majority "supports" its conclusion that the Termite Protection Plan encompasses the July 19 and 24, 1996 treatment. App., *infra,* 8a-9a. Connecticut contract law, however, does not allow a court's "reasonable reading" to displace clear and unambiguous contract terms. The Second Circuit's dissenting judge concludes that the majority's holding is "at odds" with federal law. App., *infra*, 19a.

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[4] In addition to the decision of the District Court and the Second Circuit dissent, George L. Priest, Professor of Law at Yale Law School, also conducted a thorough analysis of the Termite Protection Plan. Applying general rules of contract construction, he reaches similar conclusions to the District Court and Second Circuit dissent, concluding that the terms of the contract clearly and unambiguously exclude the initial treatment on July 19 and 24, 1996. App., *infra,* 52a-63a.

3. Common sense dictates that where two federal judges (and one accomplished contracts law professor) conclude that the contract's scope clearly excludes the treatment at issue and two other federal judges conclude the opposite, there is ambiguity as to the scope of the contract. In such circumstances, ambiguities must be construed against the drafter. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (*citing* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979)). It is fundamental that the one who drafts an ambiguous document cannot later claim the benefit of the doubt. The purpose of this rule is to protect the party who did not choose the language from an unintended or unfair result. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979). The *Restatement* explains the rationale for the rule this way:

> Where one party chooses the terms of the contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of the uncertainties of meaning. *Indeed he may leave the meaning deliberately obscure, intending to decide at a later date what meaning to assert.* In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.

RESTATEMENT (SECOND) OF CONTRACTS, § 206, cmt. a (1979) (emphasis added).

4. It is difficult to characterize the majority's analysis as other than "result-oriented" where it reaches its holding only by ignoring the most basic rules of state contract law and the contract's express terms. It is even more difficult to conceive of a situation where arbitration would not be ordered if courts are allowed to engage in fictional "contract interpretations" of this type. Arbitration is a *fait accompli* where, as here, deference is paid purportedly to the principle that state contract law applies – but state contract law is ultimately brushed aside to accomplish other objectives.

This Court has previously directed the lower courts to steer clear of the type of result-driven analyses that can occur when "the fortuitous impact of the Act on efficient dispute resolution [is allowed] to overshadow the underlying motivation" of Congress in enforcing contracts according to their terms. *Dean Witter,* 470 U.S. at 220. The majority seems to doubt the seriousness of this admonition in the context of what are viewed by many as continuing proarbitration decisions by the Court.

B. The Second Circuit Erroneously Applies the FAA's Presumption in Favor of Arbitration to Preempt General Principles of State Contract Law

1. This Court has held that in construing contracts under the FAA the parties' intentions control, with one exception: ambiguity as to the scope of an arbitration clause. *Mitsubishi,* 473 U.S. at 626; *Moses H. Cone,* 460 U.S. at 24-25. If there is ambiguity as to the scope of the arbitration clause (as opposed to the contract as a whole),

this federal rule requires that arbitrability be presumed. *Id.*

2. Here, the majority holds that, even if it had not found a broad "unified contract" that encompasses prior treatment, arbitration is still appropriate. App., *infra,* 12a-13a. This suggests that when construing the scope of a broad arbitration clause, arbitrability is presumed – regardless of the scope of the contract – under the FAA. App., *infra,* 12a. The majority's understanding of the authority conferred by the FAA to preempt state contract law is clearly wrong. This Court has held that ambiguity as to interpretation of the scope of the arbitration clause, only, is to be resolved in favor of arbitration. *Moses H. Cone,* 460 U.S. at 25.

3. This Court has also made clear that the FAA "contains no express pre-emptive provision, nor does it reflect congressional intent to occupy the entire field of arbitration." *Volt,* 489 U.S. at 477; *Perry,* 482 U.S. at 493 (Stevens, J., dissenting); *Stewart,* 487 U.S. at 36-37 (Scalia, J., dissenting); *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 291 (1995) (Thomas, J., dissenting). Given the express preservation of state contract law by the FAA, and this Court's recognition of state law as applicable to an FAA analysis, approaches such as the majority's in this case are necessarily impermissible.

4. The majority's approach cannot be what was intended by Congress under any reading of the FAA, since it would leave no meaning to the FAA's explicit preservation of general rules of state contract law. Justices Thomas, O'Connor, Scalia, and Rehnquist have all criticized the Court's expansive interpretation of the

FAA. *See, e.g., Southland Corp. v. Keating,* 465 U.S. 1, 22-23 (1984) (O'Connor, J., dissenting); *Allied-Bruce,* 513 U.S. at 286 (Thomas, J., dissenting). Justice Stevens recently criticized the Court's still-expanding interpretations of the FAA in *Circuit City. Circuit City,* 2001 WL 273205, at *15 (Stevens, J., dissenting). While it is clear that Congress could have preempted state contract laws, it is equally clear that it did not. *Allied-Bruce,* 513 U.S. at 283 (O'Connor, J., concurring). Because the express language of the FAA preserves the role of the states in protecting contracting parties' expectations through general principles of state contract law, the majority's approach here can only be characterized as an unauthorized preemption of state law.

C. The Second Circuit Erroneously Concludes That An Arbitration Agreement Existed for the Treatment Services

The state contract law analyses performed by the District Court and the Second Circuit's dissenting judge, as well as by Professor Priest, all lead to the same conclusion: the July 19 and 24, 1996 treatment does not fall within the scope of the Termite Protection Plan. The agreement to treat was an oral one, just as oral agreements are entered into for other home services such as lawn mowing, tree spraying and snow removal. That the Mehlers paid for two services at one time is irrelevant. App., *infra,* 15a-16a. The seven facts relied upon by the majority cannot change the clear and unambiguous terms of the parties' written agreement.

II. THE SECOND CIRCUIT'S REJECTION OF PETITIONERS' UNCONSCIONABILITY ARGUMENTS AS "WITHOUT MERIT" CONFLICTS WITH *GREEN TREE* AND THE OTHER CIRCUITS

1. The Second Circuit majority's summary holding that petitioners' unconscionability claims have no merit conflicts with this Court's recent decision in *Green Tree Financial Corp. v. Randolph,* 531 U.S. 79 (2000) and the full factual and legal reviews made by the ten other circuits that have considered such issues. *Green Tree* recognizes the proposition that "large arbitration costs [can] preclude a litigant . . . from effectively vindicating . . . rights in the arbitral forum." *Green Tree,* 121 S. Ct. at 521. The Court makes clear in *Green Tree* that "a party seek[ing] to invalidate an arbitration agreement on the grounds that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs." *Id.* at 522.

2. The Second Circuit majority's decision is erroneous and contrary to the decisions of five other circuit courts that have ruled on similar facts. The D.C. Circuit, Seventh Circuit, Ninth Circuit, Tenth Circuit and the Eleventh Circuit have all held certain arbitration clauses unenforceable. *See, e.g., Shankle v. B-G Maint. Mgmt. of Colorado, Inc.,* 163 F.3d 1230, 1234 (10th Cir. 1999) (arbitration clause imposes large arbitration fees); *Paladino v. Avnet Computer Tech., Inc.,* 134 F.3d 1054, 1062 (11th Cir. 1998) (arbitration clause fails to disclose fee and limits damages); *Cole v. Burns Int'l Security Servs.,* 105 F.3d 1465, 1485 (D.C. Cir. 1997) (arbitration clause fails to disclose size of potentially large arbitration fees); *Graham Oil Co. v. ARCO Prods. Co.,* 43 F.3d 1244, 1248-49 (9th Cir. 1994),

cert. denied, 516 U.S. 907 (1995) (arbitration clause limits damages and shortens statute of limitations); *Parrett v. City of Connersville, Ind.*, 737 F.2d 690, 696 (7th Cir. 1984), *cert. dismissed*, 469 U.S. 1145 (1985).

3. Even circuits that have not yet invalidated an agreement to arbitrate based on unconscionability have recognized unconscionability as a valid defense and have engaged in a thorough case-by-case factual review. *See, e.g., Sydnor v. Conseco Fin. Servicing Corp.*, No. 00-2304, 2001 WL 223243 (4th Cir. Mar. 7, 2001) (unknown fees and costs are not proper basis to invalidate arbitration agreement); *Dobbins v. Hawk's Enters.*, 198 F.3d 715, 717 (8th Cir. 1999) (noting potential for fees to make arbitration agreement unconscionable); *Williams v. CIGNA Fin. Advisors, Inc.*, 197 F.3d 752, 764 (5th Cir. 1999) (party opposing arbitration did not establish that forum fees hampered or discouraged prosecution of claim); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181-182 (3d Cir. 1999) (fine print on reverse side of form contract and claimed lack of mutuality does not make agreement unconscionable); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 14-15 (1st Cir. 1999) (fees argument rejected in the context of NYSE arbitration, noting that "case has no bearing whatsoever on the enforceability of agreements to arbitrate consumer contracts").

4. Connecticut contract law recognizes unconscionability as a defense to a contract claim. *See, e.g., Smith v. Mitsubishi Motors Credit of Am., Inc.*, 721 A.2d 1187, 1190 (Conn. 1998) (contracts may be unconscionable due to unfair surprise or oppressive terms). Here, petitioners have asserted three separate grounds for holding the arbitration clause unconscionable: nondisclosure of the

jury trial waiver; nondisclosure of steep arbitration fees, including a $7,000 AAA filing fee; and the imposition of limitations on the claims and remedies available to the Mehlers in arbitration.

5. The Second Circuit's outright refusal to acknowledge the potential merits of petitioners' unconscionability defense and to conduct the factual inquiry required by Connecticut contract law and *Green Tree,* and carried out by ten other circuits in similar circumstances, is another example of the Second Circuit's impermissible result-oriented approach to interpretation of the contract.

A. Waiver of Constitutional Right to Jury Trial

1. This Court has held that "a waiver of constitutional rights in any context must at the *very least* be clear." *Fuentes v. Shevin,* 407 U.S. 67, 95 (1972) (emphasis added). It held in *Volt* that a party may not be forced to arbitrate in the absence of a clear agreement to do so, since "[a]rbitration under the Act is a matter of consent, not coercion." *Volt,* 489 U.S. at 79.

2. Most arbitration agreements today contain an explicit, conspicuous waiver of the right to a jury trial, often in bold, capital letters. *See, e.g., Green Tree,* 121 S.Ct. at 518 n.1; *Sydnor,* 2001 WL 223243 at *3; *Harris,* 183 F.3d at 177; *Shankle,* 163 F.3d at 1232; and *Cole,* 105 F.3d at 1469. These waivers have been held to provide a sufficient basis for the courts to conclude that the party had the opportunity to read the contract and, therefore, knowingly and voluntarily waived the right to a jury

trial. Here, Terminix's preprinted form arbitration agreement does not contain any notice of the waiver of the constitutional right to a jury trial, making it inherently suspect.

3. State law governing the formation and enforceability of contracts, not the FAA, determines whether a valid and enforceable agreement exists between parties. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The Connecticut Supreme Court has held that jury trial waivers entered into in advance of litigation are enforceable only when there is *clear evidence* of an intent to waive that right. *L & R Realty v. Connecticut Nat'l Bank*, 715 A.2d 748, 755 (Conn. 1998) (emphasis added). Often the intent to waive is apparent on the face of the agreement and can be discerned from the conspicuousness of the waiver. *Id.*

If there is a dispute as to whether there was intent to waive, the party challenging the waiver is allowed to furnish evidence that there was an inequality of bargaining power, that he or she was not represented by counsel, or that other facts exist indicating a lack of intent to be bound by the waiver. *Id.* Once a party has come forward with such evidence, the trial court *must* hold a hearing. *Id.* Given this standard, where, as here, there is no express jury trial waiver there is no evidence of intent to waive the right to a jury trial.

These factors were applied in *Norton v. Commercial Credit Corp.*, No. 98-0578441, 1998 WL 729700 (Conn. Super. Ct. Oct. 6, 1998), to invalidate an arbitration agreement that effected a jury trial waiver without making any direct reference to waiver of access to the courts or to the right to a jury trial.

4. Here, although the Termite Protection Plan extinguishes the Mehlers' constitutional right to a jury trial without any notice of the jury trial waiver, the Second Circuit held the waiver is enforceable. It reached its holding without remanding for a hearing, without analysis, and in disregard for applicable state law and the contrary rulings of other federal and state courts. The court improperly disposed of petitioners' claims as "without merit." App., *infra*, 14a.

B. Steep or Undisclosed Arbitration Fees

1. A number of circuit courts have held recently that arbitration agreements that impose significant filing and hearing fees, or that fail to disclose what could turn out to be significant arbitration fees, are unenforceable. For example, in *Cole*, 105 F.3d at 1465, the D.C. Circuit made a thorough review of the law and public policy issues implicated by pre-dispute arbitration agreements. The court rested its holding that the arbitration agreement was enforceable on the fact that the AAA's rules for employment disputes did not (unlike the Commercial Arbitration Rules applicable to the Mehlers here) require the employee to pay steep and ongoing arbitrators' fees to pursue his discrimination claims. *Id.* at 1484. Estimating the fees to range from $500 to $1,000 or more, daily, the court stated that "[i]n sum, we hold that Cole could *not* be *required to arbitrate* his public law claims as a condition of employment *if* the AAA *required him to pay all*

or part of the arbitrator's fees and expenses." *Id.* at 1485 (emphasis added).

The Eleventh Circuit followed *Cole's* lead in *Paladino,* 134 F.3d 1054, holding that an arbitration agreement that imposed a $2,000 filing fee and potential responsibility for a portion of the arbitrators' fees is unenforceable. *Paladino,* 134 F.3d at 1062. Similarly, the Tenth Circuit held that an arbitration agreement that imposes substantial, undisclosed fees that were projected to total between $1,875 and $5,000 is unconscionable and unenforceable. *Shankle,* 163 F.3d at 1234.

2. Some courts have invalidated arbitration agreements that impose high fees even where the parties are sophisticated commercial entities. In *In Matter of Arbitration between Teleserve Systems Inc. and MCI Telecommunications Corp.,* 659 N.Y.S.2d 659, 660-64 (N.Y. App. Div. 1997), *appeal and rearg. denied,* 1997 N.Y. App. Div. LEXIS 10626 (1997), a New York appellate court held that a contract between sophisticated telecommunications firms was unconscionable where the arbitration filing fee was calculated on the basis of one-half percent of the amount at stake. The case concerned a $40 million antitrust dispute, bringing the arbitration filing fee to $204,000. The court held that the filing fee was patently excessive, oppressive, burdensome, and a bar to arbitration.

3. In the present case, AAA notified the Mehlers that they are required to pay a $7,000 filing fee. The Mehlers objected, claiming hardship. App., *infra,* 80a-81a. By holding that the steep, undisclosed fee imposed by Terminix's arbitration clause does not render the clause

unenforceable, the Second Circuit showed complete disregard for general principles of state contract law.

C. Waiver of Claims or Remedies

Both the Seventh and Ninth Circuits have invalidated arbitration agreements that required claimants to forfeit rights and benefits available by law, including the recovery of certain types of damages. In *Parrett,* 737 F.2d 690, an employment case, the circuit court held that arbitration offends due process where the arbitration agreement prevents the arbitrator from awarding full common law damages and preventing harm from occurring to the plaintiff who had been constructively discharged. *Parrett,* 737 F.2d at 696. In *Graham Oil,* 43 F.3d 1244, the circuit court struck down an arbitration clause that compelled the plaintiff to waive claims and agree to a shorter statute of limitations. *Graham Oil,* 43 F.3d at 1248-49. These cases stand for the proposition that courts should not compel arbitration unless the arbitration clause allows the arbitrator power to provide all of the relief available by law.

III. THE PETITION SHOULD BE GRANTED

This court should grant the petition to consider whether decisions such as the Second Circuit's amount to an unauthorized preemption of state contract law under the FAA. Applying a result-oriented contract analysis, failing to give effect to a contract's clear and unambiguous terms, construing ambiguities against the non-drafting party, and dismissing serious claims of unconscionability under state law without a hearing or analysis – only to force arbitration on an unwilling party under the cover of the FAA – represents the type of extremism and disregard for contract law that the FAA was intended to prevent.

Congress can do no more than what it has already done in passing the FAA to correct the courts' unwillingness to enforce the terms of parties' contracts. While the pendulum has swung from an irrational antiarbitration attitude among courts to an equally irrational proarbitration attitude, the FAA's remedy is as appropriate now as it was when enacted: enforce the terms of parties' agreements. It is the proper and essential role of this Court to ensure that courts carry out Congress's will.

Judicial extremism and disregard for state contract law are as wrong on one side of the arbitration spectrum as on the other. Courts are not legislative bodies. Our system of federalism depends upon the Court's willingness to enforce Congress's legitimate allocation of power between the federal government and the states. There is an urgent need for the Court to make clear that the terms of parties' agreements will be enforced under principles of state law – even if it means that arbitration, on occasion, is not the outcome.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 2001

205 F.3d 44

United States Court of Appeals,
Second Circuit.

Jeffrey N. MEHLER and Mary S. Russell,
Plaintiffs-Appellees,

v.

THE TERMINIX INTERNATIONAL COMPANY L.P.,
Defendant-Appellant.

Docket No. 98-9407.
Argued: Sept. 30, 1999

Decided: Feb. 24, 2000

Thomas F. Harrison, Day, Berry & Howard LLP, Hartford, CT (Peter R. Knight, of counsel), for Defendant-Appellant.

Margaret A. Little, Stratford, CT (Martha A. Dean, Hartford, CT, of counsel), for Plaintiffs-Appellees.

(Richard Blumenthal, Attorney General of Connecticut (Garry Desjardins, Assistant Attorney General, of counsel), submitted a brief for amicus curiae the State of Connecticut).

Before: MINER, PARKER, and STRAUB, Circuit Judges.

Judge PARKER dissents in a separate opinion.

STRAUB, Circuit Judge:

Defendant and Appellant the Terminix International Company L.P. ("Terminix") appeals from an order of the United States District Court for the District of Connecticut (Alvin W. Thompson, *Judge*), denying its motion to dismiss or in the alternative to stay the litigation and compel arbitration, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, in light of an arbitration clause contained in a written agreement between the parties for termite control services. *See Mehler v. Terminix Int'l Co.*, No. 397CV2390, 1998 WL 893149 (D.Conn. Sept.28, 1998). We conclude that the agreement containing the indisputably broad arbitration clause encompassed the entire contractual relationship between the parties and that, in any event, the claims relate to the agreement, irrespective of the agreement's temporal or substantive breadth. Therefore, we reverse the order of the District Court denying Terminix's motion and remand with instructions to stay the proceedings and direct the parties to proceed to arbitration.

BACKGROUND

This dispute arises out of an accident that occurred while Terminix was providing termite extermination services at the home of Jeffrey N. Mehler and Mary S. Russell. Terminix performed the first of a two-day extermination treatment of the plaintiffs' home on July 19, 1996, and returned to complete the treatment on July 24, 1996. The plaintiffs contend, and Terminix does not dispute, that in the course of performing these services, the Terminix technician punctured their underground home heating oil line, resulting in the discharge of oil to the plaintiffs' and their neighbors' property.

Also on July 19, the Terminix representative provided the plaintiffs with a document ("Agreement"), with the heading "Termite Protection Plan" on the first page, which was signed by Mehler on that date. The Agreement provides: "Effective UPON COMPLETION through 2 YEARS, for the sum of $1500.00 + TAX, Terminix will provide the necessary service to protect the identified property against the attack of subterranean termites. . . . " (The words in all caps were filled in by hand by the Terminix representative). The Agreement further contains a note to the customer in the upper right-hand corner stating that: "This is a service order and copy of the Termite Protection Plan. This service order is contingent on approval of the Terminix branch manager. You will receive written confirmation that your contract is in effect when the work is completed and Terminix has been paid in full." Further, the Agreement specifies that "[t]his plan provides protection against new subterranean termite damage to the structure and contents. If new damage occurs during the contract term, Terminix will . . . arrange for the necessary repairs or replacement. . . . "

"New damage" is defined in the Protection Plan as "damage done by subterranean termites subsequent to the inception date of this contract; the definition excludes damage existing at the inception date." "[O]ld damage . . . is not covered under this Plan." Paragraph 8 of the Terms and Conditions states: "ENTIRE AGREEMENT. The Service Order signed at the time of purchase, the Termite Protection Plan and the Inspection Graph constitute the entire agreement between the parties and no other representations or statements will be binding upon the parties." Paragraph 9 of the Terms and Conditions contains an arbitration provision, which states in relevant part: "The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration."

The Protection Plan attaches, and expressly incorporates, two graphs dated July 12, 1996, and signed by Mehler on July 19, 1996, one showing the plaintiffs' stand-alone garage and one showing their residence and reflecting the pre-existence or non-existence of termite activity and damage on that date. According to Terminix, the numbers on the graph, *i.e.* "117," reflect specifications for initial treatment of the property. Lastly, the Agreement states that "Terminix has provided the Purchaser with a copy of the manufacturer's specimen label . . . for the termiticide(s) which will be used to treat the above-named property."

At some point after the initial two-day treatment was completed, Terminix sent the plaintiffs a document entitled "Termite Guarantee," which references and restates in part the Protection Plan in the Agreement, and states that the Protection Plan "provides for arbitration of any controversy or claim arising out of or [relating] to the Plan." Also at some point after the completion of the two-day July termite service, Terminix provided, and Russell signed, a "Completion Certificate," stating that the work at her home had been performed "according to specifications submitted to [her] by Terminix." Finally, the plaintiffs do not dispute that only one $1500 fee, as specified in the Agreement, was paid to Terminix for all work done by Terminix, including that on July 19 and July 24.

On October 30, 1997, Terminix initiated arbitration proceedings to resolve the plaintiffs' claim that Terminix is liable for the discharge of oil to their and their neighbors' property, and the plaintiffs filed an Answering Statement with the American Arbitration Association ("AAA") asserting that the AAA lacks jurisdiction to hear their claims because they never agreed to arbitrate the dispute placed before the AAA.

On November 12, 1997, the plaintiffs filed a complaint in the District of Connecticut seeking, *inter alia,* compensation for property damage and personal injury under various tort theories; punitive damages under the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen.Stat. § 42-110a *et seq.;* invalidation of the contract between the parties as unfair, oppressive and unconscionable; and declaratory relief that the claims at issue do not fall within the arbitration clause contained in the Agreement between the parties. Terminix filed a motion to dismiss or in the alternative to stay the litigation pending arbitration, pursuant to the FAA in the District Court, which was denied on September 28, 1998.

This timely appeal followed.

DISCUSSION

I. *Applicability of the FAA and Standard of Review*

The FAA creates a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). There is no dispute on appeal that the FAA applies to the arbitration agreement at issue, which affects interstate commerce. *See id.;* 9 U.S.C. §§ 1 &

2. Section 3 of the FAA provides for stays of federal proceedings pending arbitration under appropriate circumstances. *See generally* 9 U.S.C. § 3.

A court asked to stay proceedings pending arbitration must resolve two issues relevant here: "first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement." *Oldroyd v. Elmira Sav. Bank,* 134 F.3d 72, 75 (2d Cir.1998). The plaintiffs assert that the District Court concluded that the first element was not satisfied in this case. Clearly, this assertion is incorrect. While stating the general principle that "parties may not be compelled to submit a dispute to arbitration unless they have agreed to do so," the court framed the issue before it as the "scope of the parties' arbitration agreement." Thus, the District Court correctly concluded that there was an arbitration clause to which the parties had agreed, and the relevant question, addressed by the District Court and on review, is whether the claims are within the scope of that clause, either because the claims arise under the contract containing the broad arbitration clause, or because they relate to the contract containing the clause. We review a district court's determinations on these issues *de novo. See id.* at 76.

II. *The Scope of the Agreement*

A. *The Agreement Between the Parties Is a Unified Contract*

The District Court rested its decision on a finding that, although there was a broad agreement to arbitrate between the parties, the plaintiffs' claims were not within the scope of that agreement. The District Court's main concern was that the arbitration clause was contained within a contract that, in the court's view, did not pertain to the services at issue. *See Mehler v. Terminix*, 397CV2390, 1998 WL 893149, at *5 (D.Conn. Sept. 28, 1998) (stating that "work that must be completed before a contract can become effective cannot be within the scope of that contract, unless there is some express provision specifying how that is to be so").

We take no issue with the District Court's decision to determine the relationship between the claims and the scope of the contract containing the arbitration clause. *See Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 23 (2d Cir.1995) ("the task of determining whether a claim or a set of claims 'arises out of or relates to' the particular contract in which the arbitration clause is found" is a task properly done by the district court); *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir.1983) ("The question of whether a dispute between the parties is covered by the arbitration agreement is for the courts to decide."). But, we disagree with the court's resolution of that issue.

The plaintiffs argue, and the District Court seems to have accepted, that there were two separate contracts: an oral one entered into between the parties before services were rendered on July 19, which pertained to the initial termite treatment on July 19 and July 24, and the written one, containing the arbitration clause, pertaining only to future termite protection services and effective after the date that the oil puncture occurred. Thus, the plaintiffs argue, because their claim arose under a distinct, earlier contract from the one containing an arbitration clause, the clause – no matter how broadly worded – cannot relate back to the claims under a separate contract.

Terminix, by contrast, argues that there was only one contract between the parties, the written Agreement which contains three parts: (1) application of termiticide to the property, by reference to the service order and graphs attached to the Agreement; (2) the Protection Plan, which provides for future services; and (3) the guarantee of those future services. We agree with Terminix.

As the District Court correctly stated, in deciding whether the parties agreed to arbitrate a certain matter, courts should generally apply state-law principles that govern the formation of contracts. *See First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). The District Court cited Connecticut's policy that "in the absence of an express term in the . . . agreement itself, . . . agreements do not typically apply retroactively," *Housing Auth. of Norwalk v. Ross,* No. SPNO 9206-A2880, 1993 WL 394294, at *4 (Conn.Super.Ct. July 19, 1993), and concluded that the Agreement, and accordingly the arbitration clause, could not apply retroactively given this rule of construction. *See Mehler,* 1998 WL 893149, at *8. The flaw in this conclusion, however, is that it assumes that the Agreement covers only the period after the initial two-day services had been rendered – when the accident occurred – and, therefore, would have to apply retroactively to cover the instant dispute.

Our reading of the Agreement leads us to conclude that it constitutes a unified contract for extermination and continual protection, encompassing all aspects of the services, beginning on July 19, provided by Terminix to the plaintiffs. First, the Agreement was signed on the day, and before, the initial service began. Second, the Agreement expressly refers to itself as containing two separate parts, namely, the "Service Order" and the "Termite Protection Plan." Third, the Agreement attaches and expressly incorporates graphs specifying the termite damage at that time and the treatment to be provided during the initial two days. Fourth, the Agreement states that the Protection Plan, the Service Order signed at the time of purchase, and the Inspection Graphs constitute the entire agreement between the parties. Fifth, the plaintiffs signed a statement that work had been done on their house according to specifications submitted by Terminix, and those specifications were contained in the graphs incorporated into the Agreement. Sixth, the plaintiffs' own complaint supports the conclusion that there was only one contract. *See Oldroyd,* 134 F.3d at 77 ("In determining whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the factual allegations in the complaint rather than the legal causes of action asserted."). The plaintiffs' complaint repeatedly alleges that Terminix punctured their fuel oil line, "[w]hile performing work under the contract," or "in connection with the termite control contract," or during "the work planned under the contract." Finally, that the plaintiffs made only one payment to Terminix for all work done by Terminix supports the notion that there was only one contract between the parties. *See Crowther v. Gerber Garment Tech., Inc.,* 8 Conn.App. 254, 263, 513 A.2d 144, 149 (Conn.App.Ct.1986) ("The conduct of the parties regarding the terms of a contract is a useful and proper aid to its interpretation.").

The Agreement, and the Termite Guarantee that refers to and incorporates the Termite Protection Plan, do provide for an effective starting date after the date of the initial services. However, a reasonable reading of the Agreement, in light of its language, the timing of its execution, and the conduct of the parties, indicates that that date pertains only to the Protection Plan and the Guarantee, which constitute only part of the Agreement as a whole. *See Venture Partners, Ltd. v. Synapse Techs. Inc.*, 42 Conn.App. 109, 118, 679 A.2d 372, 377 (Conn.App.Ct.1996) (stating that the determinative test in deciding whether a contract constitutes a unified whole "is in ascertaining from the language used, read in the light of the surrounding circumstances, what was the intention of the parties"); *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1098-99 (2d Cir.1992) (concluding based on various factors that it would be an unreasonable reading of the contract not to read it as a "unified, inseparable whole"). As Terminix explains, a customer has the option to purchase a comprehensive plan against termite infestation on their property, including the initial extermination and the future guarantee, as the plaintiffs did. The future guarantee, as common sense dictates and the Agreement reflects, does not become effective until after the initial two-day treatment by Terminix has been completed and the customer pays the $1500 fee. Read in this light, the Agreement is distinguishable from the contracts at issue in the cases relied upon by the plaintiffs.

In *Scinto v. Sosin*, 51 Conn.App. 222, 721 A.2d 552 (Conn.App.Ct.1998), *cert. denied*, 247 Conn. 963, 724 A.2d 1125 (1999), for example, the trial court limited the scope of an arbitration clause to those issues arising from construction occurring after November 15, 1990, where the contract containing the clause was memorialized and executed on that date. The appellate court affirmed that decision on the ground that the construction contract specifically limits performance to work performed after the execution date of the contract. *See id.* at 240, 721 A.2d at 562. Our reading of the Agreement here, by contrast, leads us to conclude that it encompasses all of the work done by Terminix, including that done during the two-day period when the instant dispute arose.

B. *The Unified Contract Contains an Indisputably Broad Arbitration Clause*

Having concluded that the claims at issue arise under the contract containing the arbitration clause, we must determine whether the arbitration clause in the Agreement covers those claims. Once the court has determined the threshold issue of whether an arbitration agreement exists, and that the agreement is a broad one, as here, the court must compel arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Collins,* 58 F.3d at 19 (internal quotation marks and citation omitted); *see also First Options of Chicago,* 514 U.S. at 945, 115 S.Ct. 1920 (noting that "issues will be deemed arbitrable unless it is clear that the arbitration clause has not included them" (internal quotation marks omitted)).

There is no dispute that the arbitration clause at issue is a classically broad one. *See Oldroyd,* 134 F.3d at 76. The clause provides for arbitration of "any controversy or claim between [the parties] arising out of or relating to" the Agreement. We have previously decided that this is "precisely the kind of broad arbitration clause that justifies a presumption of arbitrability." *Id.* Accordingly, because an indisputably broad arbitration clause is contained in the Agreement that encompasses the claims at issue, the motion to stay proceedings pending arbitration should have been granted.

III. *The Relationship of the Claims to the Agreement*

Terminix further contends that, contrary to the District Court's assumption, the issue sought to be arbitrated need not constitute a breach of the contract containing the arbitration clause. Rather, the relevant question is whether the dispute *"arises out of"* or *"relates to"* that contract. We agree with Terminix in this respect as well.

In *Collins,* for example, there were indisputably two separate but related contracts at issue giving rise to the plaintiffs' claims: a 1977 contract containing an arbitration clause, and a 1988 agreement, which did not. *See* 58 F.3d at 21. With respect to the claims that were articulated as breaches of the 1988 agreement only, we stated that "[t]he question is not whether the . . . claims arise under the 1988 Agreement, which has no arbitration clause; the question is whether these claims plead conduct that 'aris[es] out of or [is] related to' the 1977 Contracts, which do[ ] have such a clause." *Id.*

The precise phrasing of this standard has varied. *See, e.g., id.* (stating that "[i]f the allegations underlying the claims 'touch matters' covered by the parties' [contracts], then those claims must be arbitrated"); *Coudert v. Paine*

Webber Jackson & Curtis, 705 F.2d 78, 82 (2d Cir.1983) (deciding whether claims "pertain to" the contract at issue); *Popper v. Monroe,* 673 F.Supp. 1228, 1230 (S.D.N.Y.1987) (determining whether claims are "integrally linked" to the contractual relation). *But see Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.,* 67 F.3d 20, 29 (2d Cir.1995) (stating that all of the above tests are not particularly helpful and that the key inquiry is what was the reasonable expectation of the parties who commit themselves to be bound by the provisions of the arbitration agreement). Nonetheless, it is clear that we have not limited arbitration claims to those that constitute a breach of the terms of the contract at issue. *See, e.g., Oldroyd,* 134 F.3d at 77 (concluding that claims were within the scope of an arbitration clause because the claims "touched upon matters covered by the . . . agreement" containing the clause).

There is no question that the plaintiffs' claims relate to the Agreement, which, by its terms, provides for arbitration of claims that are only related to it. The Agreement, by express incorporation of the graphs and explicit reference to the treatment that "will be" used, provides the specifications for the initial two-day treatment during which the oil puncture occurred. Thus, irrespective of our construction of the Agreement as a unified whole, given the presumption of arbitrability that applies to broad arbitration clauses, *see id.* at 76-77 (reversing a district court's determination that a retaliatory discharge claim was not within the scope of a broad arbitration clause, based in part on the presumption of arbitrability), the motion to stay the litigation pending arbitration should have be granted on this basis as well.

CONCLUSION

We have reviewed all of the plaintiffs' remaining arguments on appeal and find them to be without merit. For the foregoing reasons, we reverse the order of the District Court denying Terminix's motion and remand with instructions to stay the proceedings and direct the parties to proceed to arbitration.

PARKER, Circuit Judge, dissenting:

I agree with the majority that the relevant question in this case is whether the claims of the plaintiffs are within the scope of the arbitration clause. The arbitration clause, contained in the Termite Protection Plan, states that "any controversy or claim between [the parties] arising out of or relating to this agreement shall be settled exclusively by arbitration." The scope of the agreement to arbitrate turns on the scope of "this agreement." I differ from the majority in my interpretation of what "this agreement" encompasses. Because I believe that "this agreement" is the Termite Protection Plan, which clearly states that it becomes effective only after the initial termiticide treatments which gave rise to the plaintiffs' claims were completed, I would affirm the judgment of the district court. *See Mehler v. Terminix Int'l Co.*, No. 397CV2390, 1998 WL 893149 (D.Conn. Sept. 28, 1998).

The majority found that the agreement referred to in the arbitration clause encompassed not only services offered under the Protection Plan, but also the initial termiticide treatments performed on July 19 and July 24, 1996. I disagree. First, the agreement being discussed bears the heading, in large bold type, "TERMITE PROTECTION PLAN." The text of that agreement (the Termite Protection Plan) deals exclusively with protection from termite damage occurring after the initial two termiticide treatments. The Protection Plan and the Termite Guarantee which incorporates the Protection Plan state clearly that the contract between the parties was not yet in effect during these initial two treatments. Therefore the arbitration clause covers only claims pertaining to protection from new damage to the treated building, not the claims at issue here.

Under Connecticut contract law, "[w]here the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms." *Lawson v. Whitey's Frame Shop,* 241 Conn. 678, 686, 697 A.2d 1137, 1141 (1997) (quoting *24 Leggett Street Ltd. Partnership v. Beacon Indus.,* 239 Conn. 284, 295, 685 A.2d 305 (1996)). The Protection Plan clearly provides that it is only effective "upon completion," for two years. The Protection Plan itself does not define "completion," but a separate "Completion Certificate" states that Terminix completed work on the Plaintiffs' home on July 24, 1996, the date of the second termiticide treatment. Thus the Protection Plan went into effect after the initial treatments that gave rise to the claims in this case.

In addition, a "Note to Customer" printed on the first page of the Protection Plan states: "You will receive written confirmation that your contract is in effect when the work is completed and Terminix has been paid in full." The work completed apparently refers to the initial termiticide treatments; Terminix was paid in full on July 31, 1996. Subsequently, written confirmation was sent to the plaintiffs by Terminix in the form of a form letter and the Termite Guarantee.

Finally, the Protection Plan states that it protects against only "new subterranean termite damage," which is damage "subsequent to the inception date." The Termite Guarantee, which incorporates the Protection Plan, offers an inception date, stating: "CONTRACT BEGINS: 08/01/96" – one week after the second termiticide treatment was applied, and one day after Terminix was paid in full. In short, the unambiguous terms of the Protection Plan and Guarantee clearly provide that the contract only became effective after the initial termiticide treatments; the Protection Plan and its arbitration clause pertain exclusively to new termite damage occurring subsequent to the initial treatments. *See Mehler,* 1998 WL 893149 at *5.

The majority does not disagree with the applicable dates of the Termite Protection Plan, but concludes that a "reasonable reading" of the agreement indicates that the start date "pertains only to the Protection Plan and the Guarantee, which constitute only part of the Agreement as a whole." But a "reasonable reading" cannot displace clear and unambiguous contract language under Connecticut law. *See Lawson,* 241 Conn. at 686, 697 A.2d at 1141. The majority imposes its reasonable reading of the agreement, even though the Protection Plan, the Guarantee, and the other documents provided by Terminix nowhere state that the contract was in effect before completion of the initial termiticide treatments.

This Court should not look further than the clear language of the contractual documents. It is irrelevant, for example, that the plaintiffs signed the Protection Plan on the date of the initial treatment, or that the Protection Plan incorporates the Inspection Graphs. At most, these facts make the agreement ambiguous, and Connecticut contract law provides that an ambiguous contract must be construed against its drafter-here, Terminix. *See Southern New England Contracting Co. v. Connecticut,* 165 Conn. 644, 656, 345 A.2d 550, 557 (1974) ("[A] contract which is susceptible of two meanings must be construed against the party who drew it."). The majority also points to language in small print which is part of a Note to Customer which says: "This is a service order and copy of the Termite Protection Plan." Given the fact that nothing in the contract provides for any services except future treatment, this language is at best a highly ambiguous reference to prior treatment. Terminix drafted all of the documents at issue, and should not be advantaged by the majority's "reasonable reading" of these documents, if the documents are ambiguous. Because the Protection Plan and Guarantee clearly state that they pertain only to damage occurring after the two initial treatments, doubts which might be raised elsewhere should not override that clear language in Terminix's favor.

As the district court correctly concluded, work that was to be completed before the contract could become effective was not within the scope of that contract. The agreement contains no provision to the contrary. "While it is clear now what sort of language the defendant wishes it had written in its Termite Protection Plan, it is equally clear that such language is not to be found there." *Mehler,* 1998 WL 893149 at *6. The majority's interpretation of the agreement as a unified contract cannot alter the fact that the effective dates of the contract were clearly specified by Terminix in the documents themselves. The initial termiticide treatments are not covered by the Protection Plan signed by the Plaintiffs, or by the Guarantee; the claims relating to those treatments are therefore not covered by that contract.

Once the contract including the arbitration clause is viewed as not covering the initial treatments, the arbitration provision in that contract should not be applied retroactively to acts that took place before commencement of the contract. The district court correctly interpreted Connecticut law to provide that the arbitration clause should not be applied retroactively. *See Mehler,* 1998 WL 893149, at *8. Connecticut law provides that contract provisions typically do not apply retroactively "in the absence of an express term." *See Housing Authority of Norwalk v. Ross,* No. 9206-A2880, 1993 WL 394294, at *4 (Conn.Super.Ct. July 19, 1993). The majority finds the district court's conclusion flawed, arguing that the agreement covered the period before the stated dates of the contract's effectiveness, so retroactive application was not required. But any flaw that may be present is in the agreement itself, according to which Terminix specifically provided that only claims arising under the Protection Plan would be submitted to arbitration.

In addition, the breadth of the arbitration clause is irrelevant in this case, because it does not alter the fact that the parties' agreement to arbitrate became effective only after the claims arose. The presumption of arbitrability that accompanies broad arbitration clauses thus does not apply here.

Finally, the majority's alternative holding that the claims are covered by the arbitration clause because they "relate to" the agreement is not supported by the law of this Circuit. This Court has not previously held that parties must arbitrate claims that arise before an agreement to arbitrate has gone into effect. Indeed, this conclusion is at odds with federal law, which does not require parties to arbitrate when they have not agreed to do so. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); *Collins & Aikman Products Co. v. Building Systems, Inc.,* 58 F.3d 16, 19-20 (2d Cir.1995). The plaintiffs only agreed to arbitrate claims arising out of or relating to services provided under the Protection Plan. I cannot see how a claim that arose as a result of services previously rendered arises out of or relates to claims which might arise as a result of future services.

None of the cases cited by the majority involved a situation where, as here, the agreement to arbitrate was not yet in effect at the time the claims arose. *Collins,* upon which the majority principally relies, involved wrongful termination of two 1977 contracts that contained arbitration clauses, as well as other claims framed as violations of a 1988 agreement which did not contain an arbitration clause. *See Collins,* 58 F.3d at 18-19. The 1977 contracts clearly were in effect before the claims arose. Here, the language of the Termite Protection Plan clearly and unambiguously states that the Protection Plan was not yet in effect at the time of the initial termiticide treatments which gave rise to the plaintiffs' claims. Therefore, these claims do not arise under and are not related to the Protection Plan.

Moreover, in *Collins* this Court did not find that any claim related to the 1977 contracts would be submitted to arbitration; rather, this Court specifically concluded that claims that did not implicate construction of the 1977 contracts or the plaintiff's rights and obligations under those contracts were beyond the scope of the contracts' arbitration agreements. *See id.* at 23.

The *Collins* analysis began by recognizing that the arbitration clauses in the 1977 contracts were broad, and therefore raised a presumption that the claims were arbitrable. *See id.* at 20. Because it was a presumption only, this Court went on to analyze whether the claims at issue implicated the 1977 contracts; "Our goal is always to enforce the agreement to arbitrate *on its own terms.*" *Id.* at 21 (emphasis added). This Court recognized that not all of the claims at issue were arbitrable: "To the extent that these claims seek relief under the 1988 Agreement for conduct that does not arise out of or relate to the 1977 Contracts, they are not arbitrable." *Id.* at 22. Finally, this Court summarized the test that we must apply:

> [I]f the arbitration clause is broad, there arises a presumption of arbitrability; if, however, the dispute is in respect of a matter that, on its face, is clearly collateral to the contract, then a court should test the presumption by reviewing the allegations underlying the dispute and by asking whether the claim alleged implicates issues of contract construction or the parties' rights and obligations under it. If the answer is yes, then the collateral dispute falls within the scope of the arbitration agreement; claims that present no question involving construction of the contract, and no questions in respect of the

parties' rights and obligations under it, are beyond the scope of the arbitration agreement.

Id. at 23.

Here, Terminix presents no question involving construction of the Protection Plan or in respect to the parties rights and obligations under the Protection Plan, because the Protection Plan on its face is concerned only with protection against future termite damage. Therefore the plaintiffs' claims do not arise out of or relate to the Protection Plan. For these reasons, I respectfully dissent from the opinion of the majority.

United States District Court, D. Connecticut.

Jeffrey N. MEHLER and Mary S. Russell
Plaintiffs,
v.
THE TERMINIX INTERNATIONAL COMPANY
L.P. Defendant.

No. CIV. A. 397CV2390(AW.

Sept. 28, 1998.

Margaret A. Little, Law Offices of Margaret A. Little, Stratford, Martha A. Dean, Regina C. Graziani, Law Offices of Martha A. Dean, Hartford, for Jeffrey N. Mehler, Mary S. Russell, plaintiffs.

George A. Dagon, Jr., Gregory A. Sharp, Murtha, Cullina, Richter & Pinney, Dean M. Cordiano, Thomas F. Harrison, Matthew J. Becker, Peter R. Knight, Day, Berry & Howard, Hartford, Mark N. Cohen, Margolis Edelstein, Philadelphia, PA, for Terminix Intl Co LP, defendants.

RULING ON DEFENDANT'S MOTION TO DISMISS OR TO STAY PURSUANT TO THE FEDERAL ARBITRATION ACT

THOMPSON, District J.

Plaintiffs Jeffrey N. Mehler and Mary S. Russell seek adjudication of their claims for property damage and personal injury allegedly incurred as a result of termite extermination services rendered by defendant Terminix International Company. The defendant has moved to dismiss this case for lack of subject matter jurisdiction, or, in the alternative, to stay all proceedings pursuant to the Federal Arbitration Act. For the reasons set forth below, the defendant's motion is being denied, because the court finds that the parties did not contract to submit the plaintiffs' claims to arbitration. Accordingly, the court will retain jurisdiction over this case.

I. *BACKGROUND*

A. *Relevant Facts*

The facts relevant to the present motion, summarized below, are contained in affidavits and other exhibits submitted by the parties, *see, e.g.*, Affidavit of Michael Baessler, on behalf of Terminix ("Baessler Aff.") (Exh. A to Doc. # 6); Affidavit of Jeffrey N. Mehler ("Mehler Aff.") (Exh. A to Doc. # 8); Termite Protection Plan (attachment to Baessler Aff.), or are apparent from the points of agreement in the parties' memoranda.

During the month of July 1996, plaintiff Jeffrey N. Mehler made arrangements with defendant Terminix International Company ("Terminix") to provide termite extermination services for the plaintiffs' home. *See* Mehler Aff. at ¶ 4.[1] Terminix treated the existing termite infestation in the plaintiffs' home on July 19 and July 24, 1996. *See* Baessler Aff. at ¶ 5, 6. During the course of this treatment, a Terminix technician drilled through the concrete foundation of the plaintiffs' home. Defendant's Motion to Dismiss, Or, in the Alternative, to Stay All Proceedings Pursuant to the Federal Arbitration Act [doc. # 6] ("Defendant's Motion") at ¶ 9. According to the plaintiffs:

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[1] Plaintiffs Jeffrey N. Mehler and Mary S. Russell, who are husband and wife, reside at the home in question, located at 9 Maritone Lane in Deep River, Connecticut. Mehler Aff. at ¶ 2.

> In the course of treating termites on our property on July 24, 1996, Terminix punctured a hole through our return fuel oil line, causing 800-1,800 gallons of fuel oil to be released under our home, through our land and onto neighboring properties.

Mehler Aff. at ¶ 10. For its part, the defendant admits as follows:

> It appears from subsequent investigations conducted by one or more of the parties in or about February 1997, that the technician's actions contributed to one or more holes [developing] in the return line to plaintiffs' home heating oil unit. Evidence of heating oil has been detected, in varying concentrations, at various locations in and around plaintiffs' property.

Defendant's Motion at ¶ 10, 11.

At the time it provided the termite extermination services described above, Terminix presented the plaintiffs with a contract entitled "Termite Protection Plan", which Mehler and a representative of Terminix signed on July 19, 1996. The essential terms of the plan are as follows:

> Effective *upon completion* through *2 years,* for the sum of *$1500.00 + tax,* Terminix will provide the necessary service to protect the identified property against the attack of subterranean termites . . . During the term of this Plan, any further treatment found necessary will be performed free of charge . . . This Plan provides protection against new subterranean termite damage to the structure and contents. If new damage occurs during the contract term, Terminix will, upon notification and inspection,

> arrange for the necessary repairs or replacement and pay the entire cost of labor and materials. New damage is defined as damage done by subterranean termites subsequent to the inception of this contract; the definition excludes damage existing at the inception date.

Termite Protection Plan (underlined portions handwritten in original).

Various "Terms and Conditions" set forth on the reverse side of the document are explicitly made part of the plan. These include an arbitration clause which provides that:

> The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association. The decision of the arbitrator shall be a final and binding resolution of the disagreement which may be entered as a judgment by any court of competent jurisdiction. Neither party shall sue the other where the basis of the suit is this agreement other than for enforcement of the arbitrator's decision. In no event shall either party be liable to the other for indirect, special or consequential damages or loss of anticipated profits.

Id. at ¶ 9 (reverse side).

Following a failure in negotiations between the plaintiffs and the defendant regarding remediation efforts to address and correct the effects of the home heating oil release, Terminix submitted the parties' dispute for resolution, on October 30, 1997, to the American Arbitration Association ("AAA"). *See* Demand for Arbitration (Exh. B to Doc. # 6). On November 13, 1997, the plaintiffs submitted an Answering Statement which asserted that the AAA "lacks jurisdiction to hear this matter" because, *inter alia,* "thus dispute does not fall within the scope of the arbitration clause of the contract." Answering Statement (Exh. 2 to Doc. # 11). The Answering Statement makes reference to this lawsuit, which the plaintiffs had filed the previous day.

B. *The Parties' Contentions*

The plaintiffs assert in their Amended Complaint at least seven causes of action for damages against the defendant, including a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen.Stat. § 42-110a *et seq.*, and the common law torts of negligence, trespass, nuisance, battery, fraudulent misrepresentation, and intentional and/or negligent infliction of emotional distress. The plaintiffs also seek an order declaring their contract with Terminix to be invalid, as violative of CUTPA and Connecticut public policy.

In their memoranda in opposition to the instant motion, the plaintiffs raise numerous objections to the defendant's contention that arbitration is mandated in this case. *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, Or, in the Alternative, to Stay All Proceedings Pursuant to the Federal Arbitration Act [doc. # 8] ("Plaintiffs' Opposition Memo"); Plaintiff's Reply Brief in Support of Plaintiff's Memorandum in

Opposition to Defendant's Motion to Dismiss, Or, in the Alternative, to Stay All Proceedings Pursuant to the Federal Arbitration Act [doc. # 12] ("Plaintiffs' Rejoinder Memo"). These objections fall into three broad categories:

> (1) that there was never any contract between the parties;
>
> (2) that, even if there was a written contract between the parties, such contract is invalid and unenforceable because it violates Connecticut law and public policy, its terms are unconscionable, and it was procured through fraudulent misrepresentations; and
>
> (3) that, even if there was a valid and enforceable written contract between the parties, the claims in this action are not within the scope of the parties' agreement to arbitrate.

Although many of the specific objections raised by the plaintiffs are of doubtful merit, the court agrees that the plaintiffs did not contract to submit the present dispute to arbitration because the unambiguous terms of the Termite Protection Plan do not cover claims arising out of or relating to the initial termite extermination treatment provided by Terminix on July 19 and July 24, 1996.

II. *DISCUSSION*

A. *Applicable Law of Arbitration*

As an initial matter, the court holds that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), provides the law of arbitration applicable to this case. Section 2 of the FAA makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. In *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995), the Supreme Court construed this phrase broadly, as "extending the Act's reach to the limits of Congress' Commerce Clause power."

Given this expansive interpretation of the reach of the FAA, there can be little doubt that the Termite Protection Plan signed by Mehler and Terminix involved interstate commerce. For one thing, Terminix is a multistate entity: a Delaware limited partnership, with its principal place of business in Memphis, Tennessee, which "provides services throughout the United States for the prevention of termite infestation and damage." Baessler Aff. at ¶ 3. In addition, it appears that any efforts by Terminix to carry out the provisions of the Termite Protection Plan – *i.e.*, its obligation to perform any necessary further treatment free of charge during the term of the plan – would require the shipment of materials from outside of Connecticut. *See* Baessler Aff. at ¶ 8 (termiticide is manufactured in New Jersey and sent to Terminix's offices in Tennessee, prior to being shipped to Connecticut).

The plaintiffs' arguments to the contrary are not persuasive. Their assertion that the principles announced in *United States v. Lopez*, 514 U.S. 549 (1995), place the Termite Protection Plan outside the reach of the Commerce Clause are without merit. Moreover, their suggestion that the FAA does not apply to consumer contracts in which one party characteristically has less bargaining power is irreconcilable with modern case law involving this statute. *See, e.g., Dobson*, 513 U.S. at 268 (holding that termite protection plan similar to that in this case fell within scope of the FAA); *Shearson/American Express, Inc. v.*

McMahon, 482 U.S. 220, 222 (1987) (upholding enforcement under the FAA of predispute arbitration agreement between customer and brokerage firm); *Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126, 127 (2d Cir.1997) (upholding enforcement under the FAA of predispute arbitration agreement between franchisor and franchisees). The Supreme Court's *dictum* in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 n. 9 (1967), relied upon by the plaintiffs for their argument regarding consumer contracts, clearly has not survived the Court's more recent decisions such as *Dobson* and *McMahon*.

B. *Principles Governing Questions of Arbitrability*

Federal policy, as embodied in the FAA, strongly favors arbitration as an alternative dispute resolution process. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989); *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 665 (2d Cir.1997). The FAA provides that written arbitration provisions in any contract involving interstate or international commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA further requires courts to stay proceedings if the issues presented are covered by an arbitration agreement and to compel arbitration in the event of a refusal to comply with a valid agreement to arbitrate. *See* 9 U.S.C. §§ 3, 4.

In determining the arbitrability of a particular dispute, a court must decide whether the parties agreed to arbitrate, and, if so, whether the scope of the agreement encompasses the claims asserted. *See Campaniello Imports, Ltd.*, 117 F.3d at 666; *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45 (2d Cir.1993); *David L. Threlkeld & Co. v. Metallgesellschaft, Ltd.*, 923 F.2d 245, 249 (2d Cir.), *cert. dismissed*, 501 U.S. 1267 (1991). Several principles guide this inquiry.

First, as a matter of basic contract law, parties may not be compelled to submit a dispute to arbitration unless they have agreed to do so. *See, e.g., Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Collins & Aikman Prod. Co. v. Building Sys., Inc.*, 58 F.3d 16, 19-20 (2d Cir.1995); *Par-Knit Mills v. Stockbridge Fabrics*, 636 F.2d 51, 54 (3d Cir.1980) ("before a party to a lawsuit can be ordered to arbitrate, there must be an express unequivocal agreement to do so").

Second, consistent with the federal policy favoring arbitration, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability." *Progressive Casualty*, 991 F.2d at 48 (quoting *Mitsubishi Motors Corp. v. Soler ChryslerPlymouth, Inc.*, 473 U.S. 614, 626 (1985)). However, the "the federal policy favoring arbitration does not give [a court] license to compel arbitration absent an agreement to do so." *Adamovic v. METME Corp.*, 961 F.2d 652, 654 (7th Cir.1992); *see also Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir.1997) ("Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate."); *Collins & Aikman Prod.*

Co., 58 F.3d at 19 ("These are rules of construction, however, and what we construe is a contract.").

Finally, "when deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). This is true notwithstanding the overlay of federal common law principles envisioned by the Federal Arbitration Act. Indeed, while the FAA "preempts state law which treats arbitration agreements differently from any other contracts, it also 'preserves general principles of state contract law as rules of decision on whether the parties have entered into an agreement to arbitrate." *Progressive Casualty*, 991 F.2d at 46 (quoting *Cook Chocolate Co. v. Salomon, Inc.*, 684 F.Supp. 1177, 1182 (S.D.N.Y.1988)); *see also Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987).

C. *Scope of the Parties' Arbitration Agreement*

The arbitration clause here at issue, contained within the Termite Protection Plan signed by the parties, covers "any controversy or claim between them arising out of or relating to this agreement." The scope of the agreement to arbitrate thus turns upon the scope of the Termite Protection Plan. In the plaintiffs' view, the plan covers only *future* services to be rendered by Terminix in the event of new termite damage to the plaintiffs' home. They argue that the plan specifically *excludes* the initial extermination services rendered on July 19 and July 24, 1996. The court agrees.

It is fundamental Connecticut contract law that "[w]here the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms." *Lawson v. Whitey's Frame Shop*, 241 Conn. 678, 686 (1997). Here, the unambiguous terms of the Termite Protection Plan reveal that: (i) the effective period of the contract is two years, beginning after the initial termite extermination treatment provided by Terminix on July 19 and July 24, 1996; and (ii) the plan relates exclusively to protection against any new termite infestation that might occur during this two-year period.

For example, the first sentence of the Termite Protection Plan provides that the plan becomes effective only "*upon completion*" and then runs for two years. Although the plan does not explicitly state *what* must be completed in order for the contract term to commence, the record reveals that the plan was signed on July 19, 1996 – the first of the two days on which Terminix provided extermination services for existing termite infestation in the plaintiffs' home. In addition, the "Completion Certificate" reflects that Terminix had completed work on the plaintiffs' home on July 24, 1996 and that the work had been performed and explained to the satisfaction of Mary Russell. *See* Baessler Aff. at ¶ 6. Moreover, a "Note to Customer" on the upper right hand corner of the plan states as follows:

> This is a service order and copy of the Termite Protection. This service order is contingent on approval of the Terminix branch manager. You will receive written confirmation that your contract is in effect when the work is completed and Terminix has been paid in full.

Clearly, work that must be completed before a contract can become effective cannot be within the scope of that contract, unless there is some express provision specifying how that is to be so. Here there is none. Thus, in context it is clear that the plan did not become effective until after these initial extermination services were completed.

This conclusion as to the effective date of the plan is supported by the language of the "Termite Guarantee" that was apparently sent to the plaintiffs at some time after the completion of the initial extermination work. *See* Plaintiff's Rejoinder Brief at Exh. A. Terminix describes this document as "confirming the protection plan terms." Defendant's Reply Brief in Further Support of Motion to Dismiss or Stay Pending Arbitration [doc. # 11] ("Defendant's Reply Brief") at 3 n. 1. At the top left corner of the "Termite Guarantee", Terminix indicates as follows:

> CONTRACT BEGINS:
> 08/01/96
> CONTRACT ENDS:
> 07/31/97[2]

Thus, at the time the Termite Protection Plan was agreed to by the parties, Terminix viewed the plan's period of effectiveness as beginning on August 1, 1996 –

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[2] The court notes that the contract end date provided for in the "Termite Guarantee" is only one year after the beginning date. This conflicts with the two-year period agreed to in the Termite Protection Plan. Given that the terms of the actual contract must control, the court assumes either: (i) that the end date on the Guarantee is off by one year; or (ii) that Terminix intended to renew the Guarantee for an additional one-year period beginning on August 1, 1997.

nearly a week after it had completed the initial extermination services which "contributed to one or more holes [developing] in the return line to plaintiffs' home heating oil unit." Defendant's Motion at ¶ 10. In addition, the Termite Guarantee states that: "The Plan provides for arbitration of any controversy or claim arising out of or reflecting [sic] to *the Plan.*" (Emphasis added). As discussed above, the unambiguous terms of the plan establish that the effective period of the plan began after the initial termite extermination treatment provided by Terminix and that the plan related exclusively to protection against any new termite infestation that might occur during this period.

The terms and conditions of the plan further demonstrate that the plan covered only obligations arising *after* Terminix had completed its initial extermination treatment on July 19 and July 24, 1996. As noted above, the parties' agreement provides that:

> During the term of this Plan, any further treatment found necessary will be performed free of charge . . . This Plan provides protection against new subterranean termite damage to the structure and contents. If new damage occurs during the contract term, Terminix will, upon notification and inspection, arrange for the necessary repairs or replacement and pay the entire cost of labor and materials.

"New damage" is defined in the Plan as "damage done by subterranean termites subsequent to the inception of this contract" – *i.e.,* August 1, 1996. The definition explicitly "excludes damage existing at the inception date." Moreover, the first paragraph of the "Terms and

Conditions" portion of the contract reiterates that "Terminix is not responsible for the repair of either visible damage or hidden damage existing as of the date of this agreement."

The defendant appears to argue that the Termite Protection Plan calls for the plaintiffs to pay Terminix for the service work done before the commencement of the period of termite protection. *See* Defendant's Reply Brief at 2, 3. However, that is not what the contract says. The contract states explicitly that "*upon completion* through *2 years,* for the sum of *$1500.00 + tax,* Terminix will provide the necessary service to protect the identified property against the attack of subterranean termites . . . " Therefore, the defendant's argument to this effect is not persuasive. While it is clear now what sort of language the defendant wishes it had written in its Termite Protection Plan, it is equally clear that such language is not to be found there.

The court thus finds that the language of this contract is clear and unambiguous and that the agreement contained therein relates solely to future protection against any new termite damage to the plaintiffs' home – for a period of two years beginning August 1, 1996. The plaintiffs' claims in this lawsuit all stem from the initial extermination services rendered by Terminix on July 19 and July 24, 1996. As a consequence, these claims do not fall within the Termite Protection Plan's arbitration clause since they do not "arise out of or relate to" the future protection of the plaintiffs' home from any "new subterranean termite damage."[3]

The defendant argues, however, that the broad wording of the arbitration clause at issue encompasses disputes arising out extermination services rendered prior to the term of the Termite Protection Plan. It is true that the clause in this case – submitting to arbitration "any controversy or claim . . . arising out of or relating to this agreement" – is the paradigm of a broad arbitration clause. *See Collins & Aikman Prod. Co. v. Building Sys., Inc.*, 58 F.3d 16, 20 (2d Cir.1995). However, the breadth of the arbitration clause does not alter the explicit limitations placed upon the breadth of the agreement to which the clause relates. The clause itself contains no indication whatsoever that it would apply to disputes arising out of conduct which took place prior to the explicitly stated term of the contract. Thus, no ordinary reader of the Termite Protection Plan would reasonably conclude that the plaintiffs knowingly and affirmatively gave up their right to file a civil action for negligent or otherwise wrongful acts stemming from the July 1996 extermination services for existing infestation in their home.

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[3] The court notes that the facts recited by the Supreme Court in *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. at 268, present an example of claims that *would* fall within the scope of the parties' arbitration clause. That case involved a "lifetime Termite Protection Plan," which a pair of homeowners purchased in 1987 from Allied-Bruce, a franchise of the defendant in the instant litigation. The dispute between Allied-Bruce and the homeowners arose in 1991, when the homeowners, having obtained a clean bill of health on the house from Allied-Bruce, sold their house and transferred the Termite Protection Plan to Mr. and Mrs. Dobson, who thereupon "found the house swarming with termites."

The cases cited by the defendant for the proposition that broad arbitration clauses should be given retroactive effect are either unpersuasive or distinguishable. For example, *Hamilton v. Dean Witter Reynolds,* Civ. A. No. 89-0351, 1989 WL 89434, at *4 (W.D.Pa. July 19, 1989), the case principally relied upon by Terminix, simply asserts, without analysis, that such clauses should not be limited to activities undertaken after the date the relevant contract was signed. *Hamilton* involved a dispute between a customer and his securities brokerage firm triggered by losses from a series of investments made in a single margin account both before and after a "Customer's Agreement" containing a broad arbitration clause was executed. *See* 1989 WL 89434, at * 1. Thus, the uniform and continuous nature of the parties' transactions, as well as the difficulty of disentangling the pre-agreement and post-agreement aspects of their dispute, plainly distinguishes *Hamilton* from the present case.

For similar reasons, the court also finds distinguishable the facts of *Prestera v. Shearson Lehman Bros., Inc.,* Civ. A. No. 86-1528-MA, 1986 WL 10095 (D.Mass. July 30, 1986), which is the case that was relied upon in the *Hamilton* decision. In *Prestera,* which also involved a dispute between customers and their stock broker, the court specifically noted that "[t]he trading Shearson did prior to the existence of a written customer agreement forms a small portion of the activity that forms the basis for the complaint." 1986 WL 10095, at *5. *See also Schorr v. GB Resources,* No. 91 Civ. 5155 (PNL), 1992 WL 183392, at *3 (S.D.N.Y. July 22, 1992) ("a significant number of events allegedly occurred when the agreement was in effect"). Other cases relied upon by Terminix either involved language in the arbitration clause which specifically provided for retroactive application, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. King*, 804 F.Supp. 1512, 1514 (M.D.Fla.1992) (arbitration agreement applying to all disputes involving any transaction, "whether entered into prior, on, or subsequent to the date hereof"); *Clark v. Kidder, Peabody & Co., Inc.*, 636 F.Supp. 195, 197 (S.D.N.Y.1986) (arbitration agreement applying to all disputes "arising out of or relating to [plaintiff's investment] accounts", which accounts operated prior to date agreement was executed), or simply fail to provide support for Terminix's position, *A.G. Edwards & Sons, Inc. v. Syvrud*, 597 So.2d 197, 202 (Ala.1992) (finding that the Federal Arbitration Act does not forbid retroactive application of arbitration agreements).

In short, the court finds that the authorities cited by the defendant are insufficient, in the context of this case, to overcome the general rule that contract provisions should not be applied retroactively "in the absence of an express term." *Housing Auth. of the City of Norwalk v. Ross*, No. SPNO 9206- A2880, 1993 WL 394294, at *4 (Conn.Super.Ct. July 19, 1993) (citing *Crother v. Gerber Garment Technology, Inc*, 8 Conn.App. 254, 262-263 (1986)); *see also Kentucky Fried Chicken Corp. v. Collectramatic, Inc.*, 547 A.2d 245, 248 (N.H.1988); *Brady v. Borough of Dunmore*, 479 A.2d 59, 61 (Pa.Commw.Ct.1984). This general rule should be applied to arbitration clauses – despite the strong federal policy favoring arbitration – where, as here, the unambiguous terms of the parties' agreement exclude application of the clause to transactions completed prior to commencement of the contract term.

III. *CONCLUSION*

The arbitration clause contained within the Termite Protection Plan signed by the parties applies to "any controversy or claim between them arising out of or relating to this agreement." As set forth above, the court concludes that "this agreement" means the Termite Protection Plan, which is explicitly limited to a two-year period beginning *after* the initial termite extermination treatment provided by Terminix on July 19 and July 24, 1996, and which relates exclusively to protection against any new termite infestation that might occur during this two-year period. The plaintiffs claims asserted in this litigation do not arise out of or relate to the Termite Protection Plan as thus defined. Rather, without exception, they stem from the initial extermination services rendered by Terminix on July 19 and July 24, 1996. For this reason, the plaintiffs are not bound by the Termite Protection Plan's arbitration clause in seeking a remedy for these claims.

Accordingly, the defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Or, in the Alternative, to Stay All Proceedings Pursuant to the Federal Arbitration Act [doc. # 6] is hereby DENIED.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of January two thousand.

Mehler, et. al., Plaintiffs-Appellees, v Terminix Int'l Co LP, Defendant-Appellant.	Dkt No: 98-9407 (Filed Jan. 10, 2001)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: /s/ Beth J. Meador,
Beth J. Meador
Administrative Attorney

DOWN PAYMENT	
$	
AMOUNT	SEQUENCE NUMBER
RECEIVED AT COMPLETION	
$	
AMOUNT	DEPOSIT NUMBER
ACCOUNT NUMBER	

TERMINIX®

THE TERMINIX INTERNATIONAL COMPANY

NOTE TO CUSTOMER

This is a service order and copy of the Termite Protection Plan. This service order is contingent on approval of the Terminix branch manager. You will receive written confirmation that your contract is in effect when the work is completed and Terminix has been paid in full.

TERMITE PROTECTION PLAN

PURCHASER JEFF MAHLER (MARY) TELEPHONE 860-526-8682

MAIL ADDRESS 9 MARITONE LANE

CITY DEEP RIVER STATE CT ZIP CODE 06417

DESCRIPTION OF PROPERTY SINGE FAMILY DEATTCH GARAGE

PROPERTY ADDRESS 9 MARITONE LANE

CITY 9 MARITONE STATE CT ZIP CODE 06417

Effective UPON COMPLETION through 2 YEARS, for the sum of $ 1500.00+TAX, Terminix will provide the necessary service to protect the identified property against the attack of subterranean termites (*Reticulitermes sp., Heterotermes sp.*). THIS PLAN DOES NOT PROTECT AGAINST FORMOSAN TERMITES (*COPTOTERMES sp.*).

Terminix will extend protection annually to the Purchaser for so long as he or she may own the property for $ 120.00+TAX per year payable on or before the end of the previous protection period. After the third year and each year thereafter, Terminix reserves the right to revise the annual extension charge.

During the term of this Plan, any further treatment found necessary will be performed free of charge. Terminix will reinspect the identified property at any time the Purchaser requests it or if Terminix believes it necessary.

This Plan provides protection against new subterranean termite damage to the structure and contents. If new damage occurs during the contract term, Terminix will, upon notification and inspection, arrange for the necessary repairs or replacement and pay the entire cost of labor and materials. New damage is defined as damage done by subterranean termites subsequent to the inception date of this contract; the definition excludes damage existing at the inception date. Unless live termites are found in the damaged area, the damage discovered is old damage and is not covered under this Plan. Repairs for new damage to commercial structures (including but not limited to multi-unit residential apartments, town houses and condominiums) are limited in the aggregate to $300,000.00.

In the event of additions or alterations to the identified property, Purchaser must give prior notice and arrange with Terminix for additional service at Purchaser's expense. Such additions or alterations may also require an adjustment to the annual extension charge.

Any additional provisions attached hereto, including the terms and conditions on the reverse side and the inspection graph dated 7/12/96 are part of this Plan.

Terminix has provided the Purchaser with a copy of the manufacturer's specimen label or other state required documents for the termiticide(s) which will be used to treat the above-named property.

X JNM
(Purchaser's Initials)

NOTICE: YOU, THE PURCHASER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FOR AN EXPLANATION OF THIS RIGHT.

PURCHASER DATE 7/15/96

TERMINIX REPRESENTATIVE DQ Balut DATE 7/19/96

TERMINIX ADDRESS 336 STATE STREET TELEPHONE 1-800-457-0204

X CITY NORTH HAVEN STATE CT ZIP CODE 06473

Key #33059 Rev. 4/95 R/P 4/95

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SERVICE MANAGER

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ServiceMaster • Terminix • Merry Maids
TruGreen-ChemLawn • American Home Shield

TERMS AND CONDITIONS

1. **EXISTING DAMAGE.** Terminix is not responsible for the repair of either visible damage or hidden damage existing as of the date of this agreement. Because damage may be present in areas which are inaccessible to visual inspection, Terminix does not guarantee that the damage disclosed on the Inspection Graph represents all of the existing damage as of the date of this agreement.

2. **WATER LEAKAGE.** Water leakage in treated areas, in interior areas or through the roof or exterior walls of the identified property may destroy the effectiveness of Terminix's treatment and is conducive to new infestation. Purchaser is responsible for making timely repairs as are necessary to stop water leakage. Upon completion of repairs by Purchaser, Terminix will provide additional treatment to control infestation at Purchaser's expense. Purchaser's failure to make timely repairs or purchase the additional necessary treatment will terminate this agreement automatically without further notice.

3. **ADDITIONS, ALTERATIONS.** This agreement covers the property identified on the Inspection Graph as of the date of initial treatment. In the event the premises are structurally modified, altered or otherwise changed or if soil is removed or added around the foundation, Purchaser will notify Terminix prior to such addition or alteration and will purchase the additional treatment required by the changes incurred. Failure to do so will terminate this agreement automatically without further notice. In the event of structural modification, Terminix reserves the right to adjust the annual extension charge.

4. **NOTICE OF CLAIMS, ACCESS TO PROPERTY.** Any claim under this agreement must be made to Terminix during the contract term or any extension thereof. Terminix is only obligated to make repairs under this agreement if a valid claim is made during the contract term, including any extension thereof, and Purchaser must allow Terminix access to the identified property for any purpose contemplated by this agreement, including but not limited to reinspection, whether the inspection was requested by the Purchaser or considered necessary by Terminix.

5. **DISCLAIMER.**

A. Terminix's liability under this agreement will be terminated if Terminix is prevented from fulfilling its responsibilities under the terms of this agreement by reason of delays in transportation, shortages of fuel and/or materials, strikes, embargoes, fires, floods, quarantine restrictions, earthquakes, hurricanes, or any other act of God or circumstances or cause beyond the control of Terminix.

B. This agreement does not cover and Terminix will not be responsible for:
(1) Damage resulting from or services required for moisture conditions, including but not limited to fungus damage.
(2) Damage resulting from or services required for masonry failure or grade alterations.
(3) Damage resulting from subterranean termites to wood decks and fences.

C. This agreement does not provide coverage for drywood termites *(Kalotermes sp., Incisitermes sp., Cryptotermes sp.)*, formosan termites *(Coptotermes sp.)*, or any other wood destroying organisms except subterranean termites *(Reticulitermes sp., Heterotermes sp.)* as stated herein.

D. **TERMINIX DISCLAIMS ANY LIABILITY FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES. THE GUARANTEES STATED IN THIS AGREEMENT ARE GIVEN IN LIEU OF ANY OTHER GUARANTEES OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

6. **CHANGE IN LAW.** Terminix performs its services in accordance with the requirements of federal, state and local law. In the event of a change in existing law as it pertains to the services promised herein, Terminix reserves the right to revise the annual extension charge or terminate this agreement.

7. **NON-PAYMENT, DEFAULT.** In case of non-payment or default by the Purchaser, Terminix has the right to terminate this agreement and reasonable attorney's fees and cost of collection shall be paid by Purchaser, whether suit is filed or not. In addition, interest at the highest legal rate will be assessed for the period of delinquency.

8. **ENTIRE AGREEMENT.** The Service Order signed at the time of purchase, the Termite Protection Plan and the Inspection Graph constitute the entire agreement between the parties and no other representations or statements will be binding upon the parties.

9. **ARBITRATION.** The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association. The decision of the arbitrator shall be a final and binding resolution of the disagreement which may be entered as a judgment by any court of competent jurisdiction. Neither party shall sue the other where the basis of the suit is this agreement other than for enforcement of the arbitrator's decision. In no event shall either party be liable to the other for indirect, special or consequential damages or loss of anticipated profits.

10. **LIMITED ASSIGNABILITY.** This agreement is assignable by Purchaser for a period of one year from the effective date. After this initial twelve (12) month period, Purchaser may not transfer or assign this agreement in whole or in part.

BEST AVAILABLE COPY

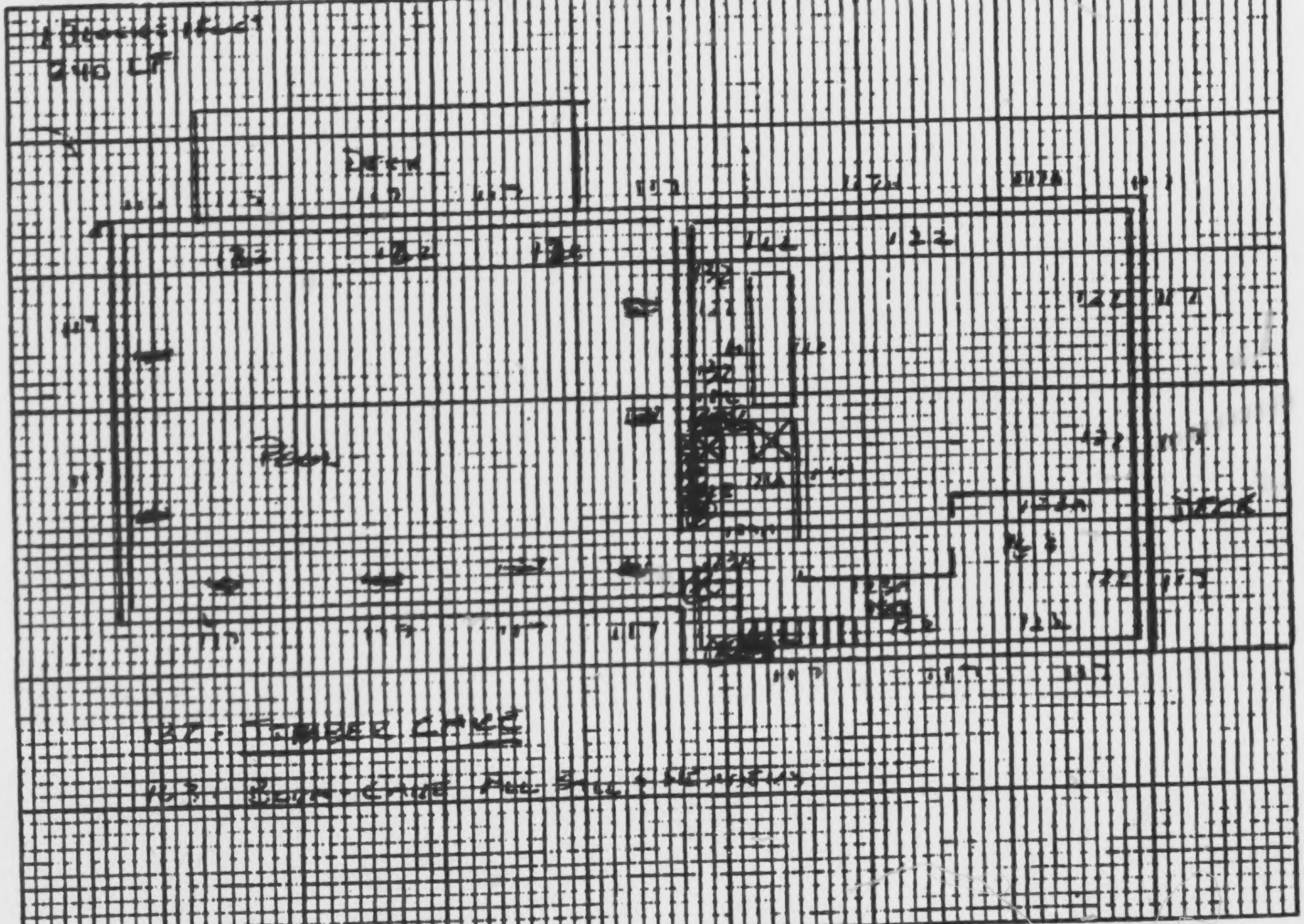
TERMINIX. INSPECTION GRAPH

OWNER'S NAME JEFF HAMLER OCCUPANT ______

TREATING ADDRESS 9 [illegible] LN CITY DEEP RIVER STATE CT

HOME PHONE 526-8682 BUSINESS PHONE ______ INSPECTED BY [illegible]

☐ INSPECTION NOTICE
POSTED: ______
DATED: ______
☐ TREATMENT NOTICE
POSTED ______
DATED ______



☐ PREVENTIVE TREATMENT OR CONTROL TREATMENT ☐	KEY: SUBTERRANEAN TERMITES = XXX DRYWOOD TERMITES = KKK DAMPWOOD TERMITES = ZZZ EXISTING DAMAGE = (X) FORMOSAN TERMITES = CCC	POWDER-POST BEETLES = PPB WOOD BORING BEETLES = WB FUNGUS = F WELL/CISTERN = WC	CARPENTER ANTS = CA CELLULOSE DEBRIS = CD EXCESSIVE MOISTURE = EM FAULTY GRADE = FG EARTH-WOOD CONTACTS = EC

TYPE OF CONSTRUCTION: CRAWL SPACE [✓ BASEMENT] MONOLITHIC SLAB FLOATING SLAB SUPPORTED SLAB

TYPE OF FOUNDATION: [✓ CONCRETE] HOLLOW BLOCK BRICK STONE OTHER ______

PROPERTY HAS A: 1. WELL [✓ YES] NO 2. CISTERN YES [✓ NO] 3. SUMP PUMP YES [✓ NO] 4. FRENCH DRAIN YES [✓ NO]

5. STUCCO BELOW GRADE YES [✓ NO] 6. "RIGID FOAM INSULATION" BELOW GRADE [✓ YES] NO

INSPECTOR'S STATEMENT OF VISIBLE DAMAGE

TERMITE DAMAGE & [illegible] IN FLOOR

[illegible] PATIO WALL [illegible] & DRYWALL

BY: [illegible] DATE: 7/12/91

CONTROL TECHNICIAN'S STATEMENT OF VISIBLE DAMAGE

BY: ______ DATE: ______

TERMINIX IS NOT RESPONSIBLE FOR REPAIRS TO DAMAGES DISCLOSED ABOVE. IN ADDITION, HIDDEN DAMAGE MAY EXIST IN CONCEALED OR INACCESSIBLE AREAS. TERMINIX CANNOT GUARANTEE THAT THE DAMAGE DISCLOSED BY VISUAL INSPECTION OF THE PREMISES SHOWN ABOVE REPRESENTS THE ENTIRETY OF THE DAMAGE WHICH MAY EXIST AS OF THE DATE OF THE INITIAL CONTROL APPLICATION. TERMINIX SHALL NOT BE RESPONSIBLE FOR REPAIR OF ANY EXISTING DAMAGE, INCLUDING, WITHOUT LIMITATION, ANY DAMAGE WHICH EXISTED IN AREAS OR IN STRUCTURAL MEMBERS WHICH WERE NOT ACCESSIBLE FOR VISUAL INSPECTION AS OF THE DATE OF THIS GRAPH.

THE ABOVE GRAPH, AND THE AREAS CONTAINING VISIBLE ACTIVITY OR DAMAGE, HAVE BEEN DESCRIBED TO ME AND ARE AFFIRMED BY ME AS OWNER OR AGENT OF THE ABOVE PROPERTY. I ALSO AFFIRM THAT I UNDERSTAND THAT TERMINIX IS NOT LIABLE FOR HIDDEN DAMAGE INACCESSIBLE TO THE INSPECTOR.

DATE: 7/15/91 BY: ______

Quality Service Network
ServiceMaster • Terminix • Merry Maids
TruGreen-ChemLawn • American Home Shield

Key #33021 Rev. 2/95 R/P 2/95
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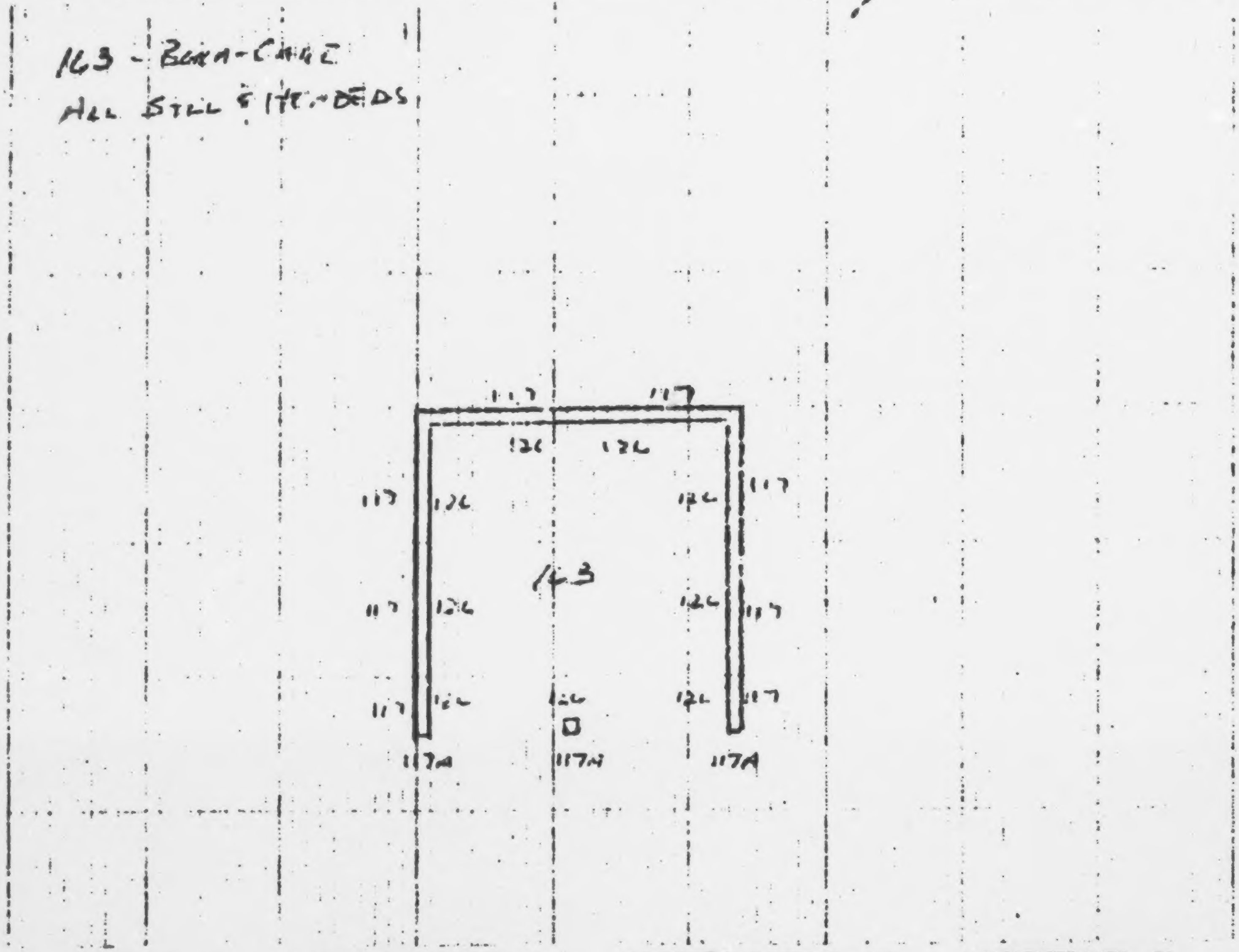
TERMINIX INSPECTION GRAPH

OWNER'S NAME JEFF MAHLER OCCUPANT

TREATING ADDRESS 7 MAINSTREET LANE CITY DEEP RIVER STATE CT

HOME PHONE 526-5552 BUSINESS PHONE INSPECTED BY

☐ INSPECTION NOTICE
POSTED:
DATED:
☐ TREATMENT NOTICE
POSTED:
DATED:


163 - BORA-CARE
ALL SILL & HEADERS

☐ PREVENTIVE TREATMENT OR ☐ CONTROL TREATMENT

KEY:
☒ SUBTERRANEAN TERMITES = XXX
☐ DRYWOOD TERMITES = KKK
☐ DAMPWOOD TERMITES = ZZZ
☒ EXISTING DAMAGE = ⓧ
☐ FORMOSAN TERMITES = CCC
☐ POWDER-POST BEETLES = PPB
☐ WOOD BORING BEETLES = WB
☐ FUNGUS = F
☐ WELL/CISTERN = W/C
☐ CARPENTER ANTS = CA
☐ CELLULOSE DEBRIS = CD
☐ EXCESSIVE MOISTURE = EM
☐ FAULTY GRADE = FG
☐ EARTH-WOOD CONTACTS = EC

TYPE OF CONSTRUCTION: ☐ CRAWL SPACE ☐ BASEMENT ☐ MONOLITHIC SLAB ☒ FLOATING SLAB ☐ SUPPORTED SLAB
TYPE OF FOUNDATION: ☒ CONCRETE ☐ HOLLOW BLOCK ☐ BRICK ☐ STONE ☐ OTHER
PROPERTY HAS A: 1. WELL ☒ YES ☐ NO 2. CISTERN ☐ YES ☒ NO 3. SUMP PUMP ☐ YES ☒ NO 4. FRENCH DRAIN ☐ YES ☒ NO
5. STUCCO BELOW GRADE ☐ YES ☒ NO 6. "RIGID FOAM INSULATION" BELOW GRADE ☐ YES ☒ NO

INSPECTOR'S STATEMENT OF VISIBLE DAMAGE
NO TERMITE DAMAGE

BY: DATE: 7/12/94

CONTROL TECHNICIAN'S STATEMENT OF VISIBLE DAMAGE

BY: DATE:

TERMINIX IS NOT RESPONSIBLE FOR REPAIRS TO DAMAGES DISCLOSED ABOVE. IN ADDITION, HIDDEN DAMAGE MAY EXIST IN CONCEALED OR INACCESSIBLE AREAS. TERMINIX CANNOT GUARANTEE THAT THE DAMAGE DISCLOSED BY VISUAL INSPECTION OF THE PREMISES SHOWN ABOVE REPRESENTS THE ENTIRETY OF THE DAMAGE WHICH MAY EXIST AS OF THE DATE OF THE INITIAL CONTROL APPLICATION. TERMINIX SHALL NOT BE RESPONSIBLE FOR REPAIR OF ANY EXISTING DAMAGE, INCLUDING, WITHOUT LIMITATION, ANY DAMAGE WHICH EXISTED IN AREAS OR IN STRUCTURAL MEMBERS WHICH WERE NOT ACCESSIBLE FOR VISUAL INSPECTION AS OF THE DATE OF THIS GRAPH.

THE ABOVE GRAPH, AND THE AREAS CONTAINING VISIBLE ACTIVITY OR DAMAGE, HAVE BEEN DESCRIBED TO ME AND ARE AFFIRMED BY ME AS OWNER OR AGENT OF THE ABOVE PROPERTY. I ALSO AFFIRM THAT I UNDERSTAND THAT TERMINIX IS NOT LIABLE FOR HIDDEN DAMAGE INACCESSIBLE TO THE INSPECTOR.

DATE: 7/13/94 BY:

Call 1-800-WE SERVE
ServiceMaster · Terminix · Merry Maids

"Jeff" Maher
9 Manitone Lane
Deep River

TERMINIX.

TERMITE and PEST CONTROL

COMPLETION CERTIFICATE

Terminix International has completed Termite

work on my home on (date) June 27, 1996 according to specifications submitted to me by Terminix.

The work has been performed and explained to my satisfaction.

CUSTOMER SIGNATURE Mary S. Russell

TERMITE SERVICE TECHNICIAN Victor Santo 015409

BRANCH MANAGER ________

TERMINIX INTERNATIONAL		CHEMICAL(S) USED:
(Street)		Dragnet
(City)	(State)	Timbor
(Telephone) 288-0021		Biocare

Key#31605 Rev. 9/89 R/P2/96

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TERMINIX.

TERMITE GUARANTEE

FOR:

Jeff & Mary Mahler
9 Maritone Ln
Deep River CT 06417-2111

CONCERNING PROPERTY AT:

9 Maritone Lane
Deep River CT 06417

1959

CONTRACT NUMBER:
2280-0041131

CONTRACT BEGINS:
08/01/96

CONTRACT ENDS:
07/31/97

TERMS AND CONDITIONS OF YOUR VALUABLE TERMITE CONTRACT

Terminix will provide the necessary service to protect the identified property against the *attack of Subterranean termites. The Plan does not protect against formosan termites* (Coptotermes sp.).

During the term of the Plan, Terminix will ...

1. Reinspect the identified property at any time the purchaser requests it or if Terminix believes it is necessary.
2. Perform any further treatment found necessary free of charge.
3. Provide for repairs or replacement of new Subterranean termite damage to the structure and contents of the identified property as long as the contract is in force.

If new damage occurs during the contract term, Terminix will, upon notification and inspection, *arrange for the necessary repairs or replacement and pay the entire cost of* labor and materials. New damage is defined as damage done by Subterranean termites subsequent to the inception date of the contract; the definition excludes damage existing at the inception date.

Any claim under the Plan must be made to Terminix during the contract term or any extension thereof. Terminix is only obligated to make repairs under the Plan if a valid claim is made during the contract term, including any extension thereof, and Purchaser must allow Terminix timely access to identified property for any purpose contemplated by the Plan, including but not limited to reinspections, whether the inspection was requested by the Purchaser or considered necessary by Terminix.

Unless live termites are found in the damage area, the damage discovered is old damage and is not covered under the Plan.

See your Termite Protection Plan for additional conditions and limitations, which are incorporated herein by reference, and shall control in the event of any conflict with this Summary. The Plan provides for arbitration of any controversy or claim arising out of or reflecting to the Plan. A copy of the Plan is available from your local Terminix Service Center.

P

TO RECEIVE SERVICE, CONTACT YOUR LOCAL TERMINIX CENTER.
OR CALL 24 HOURS: 1-800-TERMINIX (1-800-837-6464).

Our representatives can take your questions, comments and service requests at this toll-free number, 365 days a year.
IMPORTANT: Please keep this document in a safe place; you may need to present it at the time of service.

060480

GA-GA-6/96

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JEFFREY N. MEHLER) **CIVIL ACTION**
and MARY S. RUSSELL,) **NO. 3:97CV2390 (AWT)**
)
Plaintiffs)
v.)
THE TERMINIX)
INTERNATIONAL)
COMPANY, L.P.,)
)
Defendant.)
)

AFFIDAVIT OF GEORGE L. PRIEST

1. I am more than eighteen years of age. I reside in New Haven, Connecticut, and all statements made herein are based on my personal knowledge and professional experience.

2. I serve as a professor at Yale Law School, teaching courses in contracts, torts, civil procedure, insurance, antitrust, products liability, commercial law, and the economic analysis of law. I have served as a professor at Yale Law School since 1980. I hold a chair as the John M. Olin Professor of Law and Economics at Yale Law School.

3. I received a Bachelor of Arts degree from Yale in 1969 and a law degree from the University of Chicago in 1973.

4. Since 1982, I have served as the Director of the Program in Civil Liability at Yale Law School. The Program in Civil Liability is a research organization for Yale

Law School faculty members, faculty members from other universities, Yale Law students, and other individuals interested in reform of the civil justice system in the United States. From time to time, the Program sponsors conferences and symposia on issues related to civil justice reform, including participants from the federal and state judiciary and federal and state legislatures. As examples, the Program in Civil Liability with support from the National Science Foundation, among others, sponsored the Symposium, Critical Issues in Tort Law Reform: A Search for Principles, published at 14 J. Legal Studies 459-818 (1985). The Program also sponsored the Symposia, Issues in Civil Procedure: Advancing the Dialogue, published at 69 Boston U. L. Rev. 467 (1989) and Modern Civil Procedure: Issues in Controversy, published at 54 Law and Contemp. Probs. 1 (1991).

5. Much of my scholarly work has been directed toward analyzing both theoretically and empirically the economic function and effect of form contracts, including so-called "contracts of adhesion." I completed an extensive empirical study of form consumer product warranties in 1981, Priest, A Theory of the Consumer Product Warranty, 90 Yale L.J. 1297 (1981), which has been widely cited and has been reprinted and excerpted in many modern contracts casebooks and readers. I have continued in subsequent years to study the relationship between levels of consumer information and the form contracting process as well as the role of form contracts in increasing the efficiency of the contracting process to the benefit of consumers.

6. I have testified many times before the United States Congress (both the Senate and the House of Representatives), before many state legislatures, and before various state regulatory commissions on civil justice issues relating both to contracts and torts. I have been admitted as an expert and have presented testimony on contracts, civil justice, damages, and related matters in the courts of Alabama, Arizona, California, Florida, Iowa, Massachusetts, New Mexico, Texas, and Ontario, Canada.

7. I have received a Doctor of Jurisprudence degree; however, I am not an attorney and I am not licensed to practice law in any state. I have been retained by the Law Offices of Martha A. Dean to provide a report in this affidavit based upon my expertise in the economic analysis of contract formation and execution.

8. A current curriculum vitae appears as Appendix I.

Question Presented and Summary of Conclusion

9. I have been asked to express my professional opinion as to the nature and economic function of various documents relating to termite treatment and extended termite protection provided by Terminix to Jeffrey N. Mehler[1] that are the subject of this litigation. More specifically, I have been asked to opine whether these documents constitute a valid and binding contract whose

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[1] I appreciate that Ms. Mary S. Russell is also a Plaintiff in this action, but for simplicity will refer throughout exclusively to Mr. Mehler.

terms compel the Plaintiffs' claim to proceed to arbitration and that limit Terminix's liability according to the provisions of the Termite Protection Plan. It is my conclusion based upon my economic and legal expertise that, while many issues attend the question as to whether these documents constitute a valid and binding contract of any nature, it is clear that, even if held to be binding, their terms do not extend to or control claims relating to the treatment of the Mehler home provided by Terminix on July 24, 1996 designed to kill pre-existing termites. Instead, these documents address in their entirety termite-related developments that might occur after the July 24, 1996 treatment, specifically in the period beginning August 1, 1996 through July 31, 1997. The terms of the documents and the economic realities of termite control are crystal clear on this fact. As a consequence, claims deriving from the treatment to kill pre-existing termites provided by Terminix on July 24, 1996 are not affected by any of the provisions contained in the subsequent Terminix Termite Protection Plan or Termite Guarantee. Instead, the implications of the July 24, 1996 treatment that Terminix applied to the Mehler home are controlled by principles of oral contract under Connecticut law. I do not attempt to provide a legal analysis of what those controlling principles are, but am convinced on the basis of my economic and legal expertise that those principles do not include the compulsion to arbitration or limitation on liability as defined in the Terminix Termite Protection Plan.

Expert Analysis

10. The documents relevant for this claim comprise the following:

- a) Terminix Termite Protection Plan (two pages);
- b) Two Terminix Inspection graphs of the Mehler home;
- c) Terminix Completion Certificate;
- d) Terminix Receipt of Payment, referencing "July 24, 1996", and also indicating "PD 7/31/96 GM Card";
- e) Form letter from Eugene D. Gauthreaux, Jr., President of Terminix, indicating "Dear Terminix Customer", with the Mehler name and address inserted; and
- f) Terminix Termite Guarantee.

11. As appears to be uncontested, the Mehler property was initially inspected on July 19, 1996. A termite treatment designed to kill all pre-existing termites was provided on July 24, 1996. Mr. Mehler paid the bill for this treatment and for the subsequent termite prevention service contract on July 31, 1996, apparently paying by credit card over the telephone. Sometime thereafter, Terminix delivered to Mr. Mehler the Gauthreaux form letter and the Terminix Termite Guarantee.

12. Although the various provisions of these documents may initially appear somewhat confusing, there is a clear meaning and purpose to them based upon the

economic realities of termite prevention, especially termite prevention over time. What initially appears confusing is the relationship between the treatment to kill preexisting termites provided on July 24, 1996 and the continuous reference in the documents to contractual obligations that are to commence sometime after July 24, 1996.

13. Reference to the commencement of the contractual obligations subsequent to the July 24, 1996 treatment to kill pre-existing termites appears throughout. Most importantly in this regard are the following references:

a) In the Termite Protection Plan, in bold type, displayed prominently as "NOTE TO CUSTOMER" at the top right of the document appear the sentences:

> This service order is contingent upon approval of the Terminix branch manager. You will receive confirmation that your contract is in effect when the work is completed and Terminix has been paid in full.

b) Also in the Termite Protection Plan, following the name and address of the customer, in the first line of the document are the words:

> Effective UPON COMPLETION through 2 YEARS for the sum of $1500.00 + TAX, Terminix will provide the necessary services to protect the identified property against the attack of subterranean termites . . .

Significantly, the underlined words, above, were filled in by hand printing by the Terminix employee representative.

c) The Terminix Termite Guarantee indicating Mr. Mehler as the customer at top left, indicates prominently at top right, just below the term "GUARANTEE":

CONTRACT BEGINS:

08/01/96

CONTRACT ENDS:

07/31/97

14. What is the practical and economic function of such documents and how do the documents and the purported agreement that they memorialize relate to the treatment provided by Terminix on July 24, 1996 to kill all pre-existing termites?

15. It is evident from the clear provisions of the documents and from the apparent practice of the industry that the documents alleged by the Defendant to constitute a valid and binding contract all relate to the provision by Terminix of termite prevention following the treatment provided on July 24, 1996 to kill pre-existing termites. Based on the Terminix documents, the process adopted by Terminix for termite prevention services is as follows:

a) First, a Terminix employee inspects the home and maps the areas affected by pre-existing termites. This mapping both indicates where the termite killing substance will be applied to kill pre-existing termites and indicates the existence of pre-contractual termite damage, such as structural damage to the home, that will be excluded from the subsequent damage guarantee provided in the contract;

b) Next, the Terminix employee applies the treatment designed to kill all pre-existing termites. I will call this the "death treatment";

c) Following the death treatment, the Terminix employee reports to the branch manager explaining the condition of the home – that is, the extent of previous termite damage – and, most importantly, explaining the probable success of the death treatment in ridding the home of all pre-existing termites;

d) Based upon this field report, the branch manager must decide whether to extend the Termite Protection Plan and the Termite Guarantee. There are several criteria that must be satisfied before the Termite Protection Plan and Termite Guarantee will be extended: one, full payment must be received from the customer; second, the manager must be sufficiently convinced that the death treatment has been successful, that all pre-existing termites have been killed, and that the extent of pre-existing termite damage has been full identified. Only if all of these requirements are met will the Protection Plan and Guarantee be extended to the customer. Terminix reserves the right to refuse to extend the Protection Plan and Guarantee and simply charge the customer for the one-time termite treatment. (It is not clear from the documents how the price of a one-time treatment will be determined.)

e) After the branch manager is satisfied with the conditions and has decided to extend the Termite Protection Plan and Termite Guarantee, Terminix forwards to the customer the form cover letter from President Gautreaux and the Termite Guarantee. The Termite

Guarantee indicates clearly the temporal terms of the contract, which commences only after full payment has been received and the various preconditions have been subjected to review and approved to the satisfaction of the branch manager.

f) Finally, the Termite guarantee supplemented by the Termite Protection Plan provides for continuous service by Terminix over the term of the contract to kill any new termites that appear or – the Guarantee – to repair or replace any damage from new termites, which is to say, termites that invade the home in the period following application of the death treatment.

16. This is clearly the sequence of events observed in the provision of Terminix services to Mr. Mehler, none of which appears to be contested:

a) Inspection of the Mehler home and preparation of the Inspection Graphs on July 19, 1996;

b) Application of the death treatment to the Mehler home on July 24, 1996;

c) Report to the branch manager sometime after July 24, 1996 of the results of the death treatment and the extent of pre-existing termite damage to the Mehler home. (This fact is not clearly established since no document contains a signature by anyone purporting to be the branch manager. For this reason, among others, the subsequent service protection contract may be invalid, though this point is not important to the analysis here);

d) Payment by Mr. Mehler utilizing his GM (General Motors) credit card. Note that the payment receipt indicates payment by the Mehler credit card on

July 31, 1996. Thus, "PD 7/31/96 GM Card" meaning "Paid 7/31/96 General Motors Credit Card." Subsequent to the payment, decision by some Terminix official to extend to Mr. Mehler the Terminix Protection Plan and Termite Guarantee;

e) Sometime thereafter, the forwarding to Mr. Mehler of the Gautreaux letter and the Termite Guarantee. Significantly, the Guarantee indicates that the term of the contract is to commence on "08/01/96", one day after Mr. Mehler's payment by credit card.

17. This interpretation of these documents and of the Terminix procedure is not based on mere speculation. There are very good economic reasons why Terminix would adopt such a procedure for its provision of termite prevention services over time. In economic marketing terms, Terminix is attempting to establish a reputation in the market as a reliable source of termite prevention. Terminix achieves this end by more than successfully killing pre-existing termites in a one-time application. Terminix distinguishes itself from other (especially local, single-person) termite control companies by guaranteeing to the customer that it has killed all pre-existing termites and that its termite treatments will prevent new termite infestation. Indeed, the Terminix guarantee is extraordinary: The Terminix promise is to provide any further termite treatment necessary without charge and, most importantly, to pay all costs of repair or replacement of structural damage to the home resulting from new termite infestation.

18. Obviously, a guarantee of this nature cannot be taken lightly. Terminix, first, must assure itself that the

death treatment has killed all pre-existing termites. Otherwise, its guarantee of the repair of subsequent structural damage might prove disastrous. Thus, it provides for some period of time following application of the death treatment for the Terminix employee to report to the branch manager about the success of the treatment, whether there are substantial concealed or unreachable areas of the home, and so forth. Secondly, Terminix must be confident that its inspector has fully mapped the locations of pre-existing termite damage inflicted on the home prior to the death treatment. Otherwise, Terminix will be accepting liability for damages caused by termite infestation prior to the provision of the Terminix death treatment.

19. Because the implications of the Termite Guarantee and Terminix Protection Plan are so extensive, Terminix cannot automatically extend the Plan and Guarantee to any customer, upon call. Terminix requires a branch manager to sign off and approve extension of the Protection Plan and Guarantee, presumably after receiving a report from the inspector and the person applying the death treatment, after a review of the Inspection Graphs and, of course, after assuring that the customer's payment for the service has cleared. Thus, the Termite Protection Plan reads, as cited above, "This service order is contingent upon approval of the Terminix branch manager. You will receive confirmation that your contract is in effect when the work is completed and Terminix has been paid in full." Only after all of these requirements are met – in the case of Mr. Mehler, on July 31, 1996 when Mr. Mehler made payment by credit card – will Terminix

extend the Termite Protection Plan and Termite guarantee. Thus, by Terminix's own entry, the Plan and Guarantee to Mr. Mehler commenced on August 1, 1996, one day after he made payment in full.

20. Although the economic function of these documents is evident enough from the specific provisions cited above, the detailed text of each of these documents equally confirms the point that the Termite Protection Plan and Terminix Guarantee are directed entirely to Terminix services extended after the branch manager has been informed of the success of the death treatment and has signed off on extension of the Protection Plan and the Guarantee.

21. Thus, as an example, the Termite Protection Plan exclusively discusses obligations relating to new termite damage, following application of the death treatment.

a) The Plan reads in its first sentence, as related above, that the Termite Protection Plan only becomes effective after application of the death treatment:

> "Effective UPON COMPLETION [of the death treatment] through 2 YEARS . . . "

b) Similarly, the substantive content of the Protection Plan is defined as follows:

> "This Plan provides protection against new subterranean termite damage to the structure and contents. If new damage occurs during the contract term, Terminix will, upon notification and inspection, arrange for the necessary repairs or replacement and pay the entire cost of labor and materials. New damage is defined as damage done by subterranean termites subsequent to

> the inception date of this contract; the definition excludes damage existing at the inception date . . . "

22. Quite consistently, President Gautreaux's cover letter, sent accompanying the Terminix Termite Guarantee, refers exclusively to new termite damage – that is, damage occurring after the application of the death treatment – and new infestation. Thus, the letter states:

> "The Terms and Conditions on the enclosed Guarantee includes (sic) the main features of your protection. The original service agreement includes the full details. . . . Terminix automatically guarantees to protect your home against reinfestation for one full year."

23. Finally, the terms of the Terminix Termite Guarantee are equally clear: addressed to any new termite damage following application of the death treatment:

> "Terminix will . . . 3. Provide for repairs or replacement of new Subterranean termite damage to the structure and contents of the identified property as long as the contract is in force. (Emphasis in the original).
>
> If new damage occurs during the contract term [defined at the top of this document as 08/01/96 through 07/31/97], Terminix will . . . arrange for the necessary repairs or replacement and pay the entire cost of labor and materials. New damage is defined as damage done by Subterranean termites subsequent to the inception date of the contract; the definition excludes damage existing at the inception date.

> See your Termite Protection Plan for additional conditions and limitations, which are incorporated herein by reference, and shall control in the event of any conflict with this Summary. The Plan provides for arbitration of any controversy or claim arising out of or reflecting to the Plan."[2]

24. All of the documents, therefore – the Terminix Termite Protection Plan, the Gautreaux cover letter, and the Terminix Termite Guarantee – refer exclusively to Terminix's promise to prevent any new termite reinfestation or damage or to pay for the labor and materials necessary to repair any subsequently occurring damage. The arbitration clause of the Termite Protection Plan addresses claims or controversies relating to new infestation or damage. Similarly, the Protection Plan's limitation of liability relates only to claims involving new infestation or damage.

25. Again, there are good economic reasons for distinguishing the relationship between Terminix and its customers with respect to the continuing provision of protection against new termite infestation (including the guarantee) over the life of the contract from the relationship with respect to a one-time death treatment. The Terminix Termite Protection Plan and the Termite Guarantee envision the potential of a long continuing relationship between Terminix and the customer that may extend over many years. The Termite Protection Plan expressly

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[2] The more detailed description of the arbitration requirement and the limitations of Teminix liability appear in the Protection Plan but are not specifically relevant to the analysis.

allows the customer to extend protection annually, "for so long as he or she may own the property" at a fixed price per year, specified in advance. In the context of a long continuing relationship for protection against new termite infestation including repair and replacement if new infestation occurs, it is not implausible that it is in the interest of both Terminix and its customers to agree to arbitration of differences, rather than litigation, and for Terminix to cap its potential liability at some reasonable level. Thus, the Termite Protection Plan includes the arbitration clause and limitation on liability with respect to claims or controversies involving new – that is to say, post-death treatment – termite infestation or damage.

26. In sharp contrast, the death treatment is envisioned as potentially no more than a one-time, single episode application, and is of an entirely different nature. Homeowners in many different circumstances enter oral agreements for one-time, rather than continuous and repeated, services to their homes: mowing the lawn, trimming the trees, spraying for ants, shoveling snow, etc. In the context of a one-time service, it is certainly not the custom to enter an arbitration agreement or to define a detailed limitation of liability. Generally, the homeowner observes the service person complete the job. Arbitration or a limitation on liability are beside the point; if the homeowner is satisfied, he or she pays on the spot. A one-time application of the death treatment – that is, where Terminix has subsequently decided, as is its right, not to extend the potentially multi-year Protection Plan and Guarantee – is of a kind.

Summary and Conclusion

27. Based upon my personal knowledge and professional opinion and for all of the reasons stated above, it is my judgment that the implications of these documents are clear with respect to the Defendant's position that the Plaintiffs' claims are controlled by the arbitration clause and limitations of liability that appear in the Termite Protection Plan.

a) Any contract existing between Mr. Mehler and Terminix relates exclusively to the period August 1, 1996 through July 31, 1997, a period following the application of the death treatment on July 24, 1996.

b) The documents constituting the purported contract address solely liability and the process for resolving (through arbitration) claims relating to new termite damage from new infestation following the approval by the branch manager of extension of the Protection Plan and Termite Guarantee.

c) The arbitration clause by its own terms relates to "any controversy or claim arising out of or relating to this agreement", which is to say, the August 1, 1996 agreement addressing new infestation.

d) By definition, therefore, the terms of the Protection Plan and Termite Guarantee – in particular, the arbitration clause and the limitation on liability – do not control any claims relating to Terminix's application of the death treatment on July 24, 1996 which preceded the effective date of the purported contract.

Further Affiant saith not.

IN WITNESS WHEREOF, the undersigned has executed this affidavit as of the 26th day of February, 1998.

/s/ [Illegible]
Witness:

/s/ [George L. Priest]
George L. Priest

/s/ [Illegible]
Witness:

STATE OF CONNECTICUT)
ss. Town/City New Haven
COUNTY OF NEW HAVEN)

Before me, George L. Priest, personally appeared, this 26th day of February, 1998, and acknowledged the execution of this affidavit to be his free act and deed and swore to the truth of the matters set forth herein.

/s/ Lisa Mette
Notary Public

My commission expires: 5/31/00

APPENDIX I

Resume November 1997

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Olin Distinguished Lecture Series, University of California at Los Angeles School of Business (Inaugural Lecture, 1985).

Monsanto Lecture in Tort Law and Jurisprudence, Valparaiso Law School (Inaugural Lecture, 1987).

Distinguished Visiting Professor in Legal Theory, University of Toronto Faculty of Law and Department of Economics, Michelmas Term, 1988.

Martin P. Miller Centennial Lecture, University of Denver College of Law, 1992.

Fifty-Sixth Cleveland-Marshall Fund Lecture, Cleveland-Marshall College of Law, 1993.

Other Awards:

Templeton Honor Rolls for Education in a Free Society, 1997-98.

Teaching:

Recent courses: Insurance Regulation, Regulated Industries, Capitalism, Campaign Finance Regulations, Antitrust, Civil Procedure, Insurance and Public Policy, Products Liability, Advanced Antitrust, Torts, Democracy or Capitalism? (seminar).

Other offerings: Contracts, Commercial Law, Price Theory, Remedies, Criminal Case Settlement (seminar), Theories of the Common Law (seminar).

Journal Referee:

American Economic Review; Economic Inquiry; Journal of Health Politics, Policy and Law; Journal of Japanese Studies; Journal of Law & Economics; Journal of Law, Economics & Organization; Journal of Legal Studies; Law and Policy; Journal of Political Economy; Rand Journal of Economics; National Science Foundation (Law and Social Sciences) (Economics); Review of Economics and Statistics; Science.

Consultantships:

Institute for Civil Justice, The Rand Corporation, since 1980.

Other Professional Service:

President's (U.S.) Commission on Privatization, 1987-88.

American Bar Association, President's Commission to Improve the Liability Insurance System, 1987-89.

Special Master, McLendon v. The Continental Group, Inc., et. al., U.S District Court, District of New Jersey, 1989-___.

President, American Law and Economics Association, 1991-92.

Council of Academic Advisers, American Enterprise Institute, 1994-___.

Law Offices of Martha A. Dean

Environmental Law

November 26, 1997

Ms. Laura McNaughton
Senior Case Administrator
American Arbitration Association
111 Founders Plaza
Floor 17
East Hartford, Connecticut 06108-3256

Re: Case #: 12 192 00250 97
The Terminix International Company L.P. and Jeffrey N. Mehler and Mary S. Russell

Dear Ms. McNaughton:

The Mehlers request that any administrative fees that would normally be charged to them in this matter be waived due to hardship. If the Mehlers' response to Terminix's demand for arbitration is construed as a counterclaim, the filing fee, alone, is $7,000. Unlike Terminix, which is an international corporation with substantial assets, the Mehlers are residential property owners and consumers who have not agreed to commercial arbitration.

The Mehlers believe it does not make sense for AAA or the parties to spend time on this issue at this juncture. Currently, it is unknown whether the arbitration proceeding will take place. The Mehlers request that any discussion concerning appropriate administrative fees (including those charged to Terminix on the basis of Terminix's gross undervaluation of the amount in dispute) be deferred until such time as it is determined in court that AAA has jurisdiction over this matter.

Please do not hesitate to call me (278-6009) or Attorney Regina Graziani (278-4665) if you have any questions or concerns.

Sincerely,

/s/ Martha A. Dean
Martha A. Dean

Enclosure (duplicate copy of this letter).

cc: Jeffrey N. Mehler and Mary S. Russell
Mark N. Cohen, Esq. – Terminix

96 Hungerford Street • Hartford, Connecticut 06106
Tel: (860) 278-6009 • Fax: (860) 727-4107

Jeffrey N. Mehler, CFP

Registered Investment Advisor • Financial Planning & Money Management

Nine Maritone Lane • Deep River CT 06417 •
860-526-8682 • Fax: 860-526-8683 •
Email: JNMCFP@iname.com

November 12, 1997

Mr. William Wainscott
Director Risk Management
The Terminix International Company
c/o Service Master
860 Ridge Lake Boulevard
Memphis TN 38120-9792

By Telefax and U.S. Mail/Return Receipt Requested

Re: *Termite Protection Plan between Jeffrey Mehler and Terminix, dated July 19, 1996* – letter #16

Dear Mr. Wainscott:

Receipt of this letter serves as notice that Mary and I are formally voiding the Terminix Termite Protection Plan entered into on July 19, 1996, for services at Nine Maritone Lane, Deep River, Connecticut. This contract was to run until two years after completion of the work under the contract. As you know, Mary and I met all of our obligations under the voided agreement.

We are voiding the agreement because it is unfair, oppressive and unconscionable.

Sincerely,

/s/ Jeffrey N. Mehler
Jeffrey N. Mehler

cc: Martha A. Dean, Esq.
Mark N. Cohen, Esq. – U.S. Mail/RRR

②

Supreme Court, U.S.
FILED

MAY 10 2001

OFFICE OF THE CLERK

No. 00-1564

In The

Supreme Court of the United States

◆

JEFFREY N. MEHLER AND MARY S. RUSSELL,
Petitioners,
v.
THE TERMINIX INTERNATIONAL COMPANY, L.P.,
Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

◆

BRIEF IN OPPOSITION

◆

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QUESTIONS PRESENTED

1. Did the arbitration clause in the contract for pest control services signed by petitioner Jeffrey Mehler on July 19, 1996 apply to the actions that occurred during the application of the termiticide?

The Court below held that it did.

2. Was the particular arbitration clause contained in the contract for pest control services signed by petitioner Jeffrey Mehler on July 19, 1996 unconscionable?

The Court below held that it was not.

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STATEMENT OF THE CASE

Petitioners signed a valid contract containing an enforceable arbitration clause, they now regret that signature, and they are therefore asking this Court to protect them from their own actions by ignoring a long line of its own decisions and rewriting the seventy-five year old Federal Arbitration Act. They assert the absence of a contract where there is one, and they allege an unconscionability issue where there is none. There is nothing in the language of this arbitration clause or in the holding of the Second Circuit requiring action by this Court.

On Friday, July 19, 1996 petitioner Jeffrey Mehler, a "Registered Investment Advisor" specializing in financial planning and money management (App. 82), signed a contract for termite control services (App. 42-45). Language immediately above the line containing his signature (App. 42) informed Mr. Mehler that he could cancel the transaction at any time between then and midnight on the "third business day" (*i.e.*, five *calendar* days – until midnight on Wednesday, July 24, 1996); petitioner did not exercise that right. The "Terms and Conditions" section of the contract appears on the reverse of the side Mr. Mehler signed (App. 43). Section 8, captioned in bold upper case letters **ENTIRE AGREEMENT**, informed petitioner that the contract consisted of three components: a "Service Order" (under which Terminix would apply the termiticide products), a "Termite Protection Plan" (a warranty under which Terminix would provide the necessary service to protect the property against future termite damage), and an "Inspection Graph" (which detailed the precise locations of pre-existing termite damage that would not be covered by the warranty and showed where and how the termiticide application called for in the Service Order would be conducted). Section 9, captioned in similar bold upper case letters **ARBITRATION**, contains the agreement of the parties that "any controversy or claim between them arising out of or relating to this agreement [*i.e.*, the "Entire Agreement" as described in Section 8] shall be settled exclusively by arbitration."

Once petitioners signed this contract, Terminix applied the termiticide at their property on July 19 and July 26, 1996. During one of those applications the technician's drill apparently punctured the fuel oil return line located under the basement slab; over the next seven months approximately 800 gallons of fuel oil leaked into the soil beneath the house. On or about July 30, 1996 petitioners made the single $1500 combined payment to reflect their purchase of the termiticide applications (performed pursuant to the Service Order and Inspection Graph) and the warranty against future termite attacks (to be performed under the Termite Protection Plan). Terminix subsequently sent them an additional document known as a "Termite Guarantee" (App. 47) which confirmed that the warranty against future termite damage became effective as of August 1, 1996.

◆

REASONS FOR DENYING THE PETITION

The Second Circuit correctly found that the arbitration agreement, by its own terms, clearly applies to disputes arising out of and relating to the application of the termiticide pursuant to the Service Order. Although the Second Circuit did not specifically address the unconscionability issues raised in the petition, those claims are entirely without merit. The Second Circuit's decision is not in conflict with rulings of this Court or other circuits.

I. THE ARBITRATION CLAUSE APPLIES TO THE CLAIM OR CONTROVERSY AT ISSUE HERE

The puncture of the fuel oil return line occurred during the application of the termiticide. That application was conducted pursuant to the Service Order and the Inspection Graph. Under Section 8 of the contract that Mr. Mehler signed on July 19, the Service Order and Inspection Graph are components of the "Entire Agreement" for pest control services between the parties. Under Section 9, any dispute arising out of or relating to the Service Order or the Inspection Graph is to be settled by arbitration.

In their attempt to avoid arbitration petitioners focus exclusively, and erroneously, on language in the "Termite Guarantee" (App. 47) to the effect that the *warranty* against future termite damage "begins 08-01-96"; they argue incorrectly that despite its clear wording the arbitration clause in the July 19 contract applies *only* to disputes arising under the warranty. This argument is inconsistent with the plain and unequivocal language of Sections 8 and 9 of the signed contract that the "Service Order *signed at the time of purchase*" is part of "the entire agreement between the parties" and that "any controversy or claim arising out of or relating to" that agreement is to be "settled exclusively by arbitration." (Emphasis added.) The "Termite Guarantee" itself contains no signatures; it directs petitioners to "[s]ee your Termite Protection Plan for additional conditions and limitations" (which are incorporated into the Guarantee by reference) and pointedly notes that the provisions of the Plan "shall control in the event of any conflict with *this summary*." (App. 47) (emphasis added.) The August 1, 1996 date referenced in the Termite Guarantee reflects the fact that the warranty component of the July 19, 1996 contract could not have become effective until (1) Terminix had applied the termiticide and (2) the customer had made the appropriate payment, the specific dates of which could not have been known to or by either party on July 19th.[1] The arbitration clause by its terms is not limited to the warranty but in fact applies to *any* controversy or claim "arising out of or relating to" any individual component of the July 19, 1996 contract, specifically including the Service Order.[2]

---

[1] Those two elements are conditions precedent to the validity of the warranty against future termite damage. (*See* the "Note To Customer" in the upper right corner of the first page of the July 19 contract, App. 42.) Petitioners' brief acknowledges that the "Termite Protection Plan [*i.e.*, the warranty] states specifically that *it* goes into effect 'upon completion' of the work." (Br. 12, emphasis added.)

The Second Circuit interpreted the July 19 contract consistently with Connecticut law. The Connecticut Supreme Court has addressed that issue definitively.

> A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . The intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . *the language used must be accorded its common, natural, and ordinary meaning and usage* where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and ambiguous, the contract is to be given effect according to its terms. *A court will not torture words to import ambiguity* where the ordinary meaning leaves no room for ambiguity. . . . Similarly, *any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms.*

24 Leggett Street Ltd. P'ship v. Beacon Indus., 239 Conn. 284, 294-95, 685 A.2d 305 (1996) (citations and internal quotation marks omitted, emphasis added). The Second Circuit followed this guidance in construing the parties' intent through the terms of the contract and in light of the circumstances. Contrary to petitioners' argument, therefore, it is clear that the Second Circuit, rather than applying a "results oriented" analysis to justify its "presumption" in favor of arbitration, actually construed the terms of the contract in strict accordance with Connecticut law and *precisely* as the parties executed it. This was the question before it, and it reached the correct conclusion. "Our reading of the Agreement leads us to conclude that it constitutes a unified contract for extermination and continual protection, encompassing all aspects of the services, beginning on July 19, provided by Terminix to the plaintiffs." (App. 8.) Petitioners' arguments that in so concluding the Second Circuit somehow "infringed upon traditional state powers" or "preempted general principles of state contract law" fall of their own weight. The decision below raises no issue of "covert" or "overt" preemption of state contract law by the federal judiciary and requires no review by this Court.

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[2] As the Second Circuit noted, petitioners' complaint itself "repeatedly" alleges that the puncture occurred while Terminix was "performing work under the contract" or "in connection with the termite control contract." (App. 9.)

II. THE USE OF THE ARBITRATION CLAUSE AT ISSUE HERE IS NOT UNCONSCIONABLE.

For over seventy-five years federal law has strongly proclaimed and encouraged the right of parties to resolve disputes through arbitration as an alternative to costly and time consuming judicial proceedings.[3] Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, spells out this clear and unequivocal Congressional intent: "A written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable. . . . " This Court has held that Section 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements," and has noted with approval that the Courts of Appeals have "consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This Court has repeatedly and consistently upheld the use of arbitration, most recently in *Circuit City Stores, Inc. v. Adams*, ___ U.S. ___, 121 S. Ct. 1302 (2001) and *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). The only Congressional restraint on this otherwise broad presumption in favor of arbitration occurs if there are grounds "at law or in equity for the revocation of any contract," 9 U.S.C. § 2, but petitioners have failed to establish any such grounds here.

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[3] The Federal Arbitration Act was originally enacted in 1925, 43 Stat. 883, and was recodified in its present form as U.S. Code Title 9 in 1947.

A. Unconscionability

Unconscionability is an equitable concept that may be used by courts to preclude enforcement of "harsh and unreasonable contract terms." *Leasing Serv. Corp. v. Justice*, 673 F.2d 70, 71 (2d Cir. 1982). The classic definition of an unconscionable contract is one which "no man in his senses and not under delusion would make on the one hand, and . . . no honest and fair man would accept on the other." *Doctor's Assocs., Inc. v. Jabush*, 89 F.3d 109, 113 (2d Cir. 1996) (quoting *Hume v. United States*, 132 U.S. 406, 411 (1889)) (internal quotation marks omitted). "Unconscionability is determined by reference to the relative benefit of the bargain to the parties at the time of its making, the nature of the methods employed in negotiating it, and the relative bargaining power of the parties." *United States v. Bedford Assocs.*, 657 F.2d 1300, 1313 (2d Cir. 1981). The purpose of the doctrine is to prevent "unfair surprise and oppression." *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (2d Cir. 1984). The courts have held that there is "nothing inherently unfair or oppressive about arbitration clauses." *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986). Here, petitioners allege three grounds for holding the arbitration clause unconscionable: failure to disclose that they were giving up their right to a jury trial, failure to disclose "steep" arbitration fees, and limitation of the "claims and remedies available to them" in arbitration. None of these allegations supports a claim of unconscionability.

1. The Right To A Jury Trial.

This Court has long recognized that the Constitution does not confer an absolute right to have every claim heard before an Article III court, and that a party may agree to have a dispute determined [illegible] another forum. *CFTC v. Schor*, 478 U.S. 833, 848-49 (1986).[4] Relying on that holding, the Seventh Circuit recently reiterated that fundamental principle: "[Plaintiff] argues that the arbitration agreement violates her Seventh Amendment right to a trial by jury, but the law is clear that there is no constitutional right to a jury trial outside of an Article III forum." *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir.), *cert. denied*, 528 U.S. 811 (1999). Where the claims are properly before an arbitral forum, the jury trial right is extinguished. "In a non-Article III forum the Seventh Amendment simply does not apply." *Geldermann, Inc. v. CFTC*, 836 F.2d 310, 323 (7th Cir. 1987).

---

[4] Although *Schor* involves a non-judicial CFTC "reparations proceeding" rather than an arbitration, the principle articulated by this Court is the same.

Petitioner Jeffrey Mehler is a "Registered Investment Advisor" whose business is financial planning and money management. He is a sophisticated and experienced business person who is fully capable of reading a contract, understanding its terms, and making an informed decision. It is well known in the financial industry that brokerage houses make widespread use of arbitration clauses. The arbitration clause contained in Section 9 of the contract not only stated that the parties were agreeing to submit their disputes to arbitration but also pointed out that "[n]either party shall sue the other where the basis of the suit is this agreement. . . . " This language is clear and unambiguous and makes it plain to any reader, regardless of the level of sophistication, that the parties to the contract are agreeing to shift the locus for their disputes from a judicial to an arbitral forum. "[T]hough *perhaps* not contemplated by the Piersons when they signed the contract, loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Pierson*, 742 F.2d at 339. Moreover, "absent a showing of fraud or mental incompetence, a person who signs a contract cannot avoid h[is] obligations under it by showing that [ ]he did not read what

[ ]he signed." *Coleman*, 802 F.2d at 1352 (citing *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140 (7th Cir. 1985)).

There is nothing in the Terminix contract as a whole, or the standard arbitration clause in particular, hidden or unduly complicated. The "Service Order" and the "Termite Protection Plan" components of the written contract consist of a total of two pages with all the sections, including the arbitration clause, introduced by identically sized bold headings. The text of each individual section is printed in identically sized type. As noted above, the petitioners were in a position to fully understand what they were signing. Nothing was hidden from them and in reality the arbitration agreement is of some benefit to them. As this Court has observed, by agreeing to arbitrate a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

There is nothing about the instant agreement to use a non-judicial forum to resolve disputes that in any way distinguishes it from those involved in *Schor* or *Mitsubishi Motors, supra,* and the Second Circuit was correct in rejecting petitioners' claim of unconscionability on this issue.

2. The Costs of Arbitration.

Section 9 of the contract provides that the arbitration "shall be conducted in accordance with the Commercial

Arbitration Rules then in force of the American Arbitration Association [AAA]."[5] Terminix filed the demand for arbitration and paid the initial fee; petitioners will have to pay a filing fee only if they file a counterclaim, and under the AAA Rules[6] that fee will reflect a sliding scale based on the amount of their claim. Rule 51 provides that the AAA may defer or reduce its administrative fees "in the event of extreme hardship"; petitioners have already requested a fee waiver under this Rule "due to hardship."[7] (App. 80.) In addition, AAA Rule 52 allows the arbitrators to apportion the expenses of the proceeding to one party or the other.

It is obvious that petitioners will face fees and expenses regardless of whether they present their claims in a judicial or an arbitral forum. And as this Court has recognized, one of the advantages of arbitration is that it is faster and less costly than litigation:

> We agree that Congress, when enacting this law, had the needs of consumers, as well as others, in mind. See S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by *avoiding "the delay and expense of litigation,"* will appeal "to big business and little business alike, . . . corporate interests

---

[5] If not already familiar with those Rules through his business as a Registered Investment Advisor, Mr. Mehler certainly had the opportunity during the contractual three business day "cooling off" period (App. 42) and at any time thereafter to obtain and read a copy.

[6] The AAA's 1999 Commercial Arbitration Rules are the ones currently "in force."

[7] AAA has deferred its ruling on this request pending the outcome of these judicial proceedings.

> [and] . . . individuals"). Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. See, *e.g.*, H.R. Rep. No. 97-542, p. 13 (1982) ("The advantages of arbitration are many: *it is usually cheaper and faster than litigation;* it can have simpler procedural and evidentiary rules; . . . ").

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995), (emphasis added.) It is against this cost saving purpose of arbitration that we examine petitioners' claim that the failure of the contract to disclose the arbitration fees renders it unconscionable.

Petitioners suggest that this Court's holding in *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, somehow supports their argument; the passage they quote from that decision, however, (Br. 19) is incomplete. The relevant text, in full, is as follows:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, "we lack . . . information about how claimants fare under Green Tree's arbitration clause." *The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.*

Green Tree, 531 U.S. at 522 (citations omitted) (emphasis added). This Court went on to hold that a party seeking to invalidate an arbitration agreement on the basis of allegedly prohibitive costs "bears the burden of showing the likelihood of incurring such costs." Petitioners have not met that burden, and indeed, in view of their pending "hardship" fee waiver request under AAA Rule 51, they cannot meet it.

The Second Circuit's rejection of petitioners' unconscionability argument on this issue does not conflict with but in fact mirrors this Court's decision in *Green Tree*. Nor is the Second Circuit's holding in conflict with three circuit court decisions cited by petitioners as calling for a different result here. Unlike the consumer situation here, all three cases (*Shankle v. B-G Maintenance Mgmt. of Colorado*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); and *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997)) involve situations where an *employee* was required, as a condition of employment, to agree to arbitrate any disputes with the employer. In both *Shankle* and *Cole* the arbitration agreements *by their terms* specifically *obligated* the employee to pay one-half of the cost of any arbitration proceeding, and on that basis the courts found the agreements to be unenforceable. In contrast, the arbitration agreement here, like the one in *Green Tree*, is silent on the question of costs and affords whichever party seeks arbitration the protections of AAA Rules 51 and 52. In *Paladino* the arbitration agreement did not address the payment of costs, and the Court found the agreement unenforceable on other grounds. *Dicta* in the concurring opinion suggests a potential additional ground: because the employer "makes no promises to pay for an arbitrator, employees *may be liable* for at least" half the costs of arbitration. *Paladino,* 134 F.3d at 1062 (emphasis added). To the extent that petitioners believe the concurring opinion creates a conflict between the Second and Eleventh Circuits requiring resolution by this Court, Terminix submits that the *Green Tree* decision and the factual distinctions between the cases make this unnecessary.

The fact that there are costs involved in pursuing arbitration, and that the contract did not disclose those costs, does not render it unconscionable. The Second Circuit's decision is correct and should not be reexamined by this Court.

3. The Limitation On Claims and Remedies.

Section 5 of the contract (App. 43), captioned in the same bold upper case letters used for Sections 8 and 9, provides in upper case letters in Subsection D as follows:

> **5. DISCLAIMER.**
>
> D. TERMINIX DISCLAIMS ANY LIABILITY FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES. THE GUARANTEES STATED IN THIS AGREEMENT ARE GIVEN IN LIEU OF ANY OTHER GUARANTEES OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Section 9 of the contract, reflecting the disclaimer language of Section 5, provides that neither party "shall be liable to the other for indirect, special or consequential damages or loss of anticipated profits." (App. 43.) Petitioners assert that this limitation on liability renders the arbitration clause unconscionable. They are wrong.

This Court's FAA decisions have long recognized the Act's "primary purpose of ensuring that private agreements to arbitrate are enforced *according to their terms.*" *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (emphasis added). That case involved a construction dispute governed by a contract containing a relatively standard arbitration clause. But there was an interesting twist: another section of the contract contained a choice-of-law clause reflecting the parties' agreement that the contract would be governed "by the law of the place where the Project is located," that is, California. And California's arbitration law, unlike the FAA, allows a court to stay arbitration while related judicial proceedings are pending. The University Trustees obtained a stay of the arbitration under the California law over Volt's objection that the FAA preempted that provision. The California Supreme Court declined to review the decision of the state Court of Appeals affirming the stay, but this Court then agreed to consider it.

In an opinion by the Chief Justice, and relying on its earlier holding in *Mitsubishi Motors,* 473 U.S. at 628, that the FAA "does [not] prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement," *Volt,* 489 U.S. at 478, this Court definitively resolved the question of the enforceability of arbitration terms as the parties have drafted them:

> But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, *and parties are generally free to structure their arbitration agreements as they see fit.* Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted. . . . By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.

Id. at 479 (citations omitted) (emphasis added). *See also, Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 406 (1967) ("[N]o claim is made that Prima Paint ever intended that 'legal' issues relating to the contract be excluded from arbitration, *or that it was not entirely free so to contract.*") (Emphasis added.)

The message, then, is clear: parties are generally free to structure their arbitration agreements to include or exclude whatever claims or terms they desire. Here the contract contained a disclaimer of certain damages and the arbitration clause reflected that fact. Jeffrey Mehler signed the contract and is as bound by its terms as is Terminix.

Petitioners cite two circuit court decisions in support of their argument that the contract is unconscionable because of the limitation on certain damage claims; neither is helpful, however. *Parrett v. City of Connersville*, 737 F.2d 690 (7th Cir. 1984), *cert. denied*, 469 U.S. 1145 (1985), involved a claim by a police officer who had been transferred from the detective division to the uniformed division and then contended that he was subsequently constructively and wrongfully discharged. The collective bargaining agreement between the city and the police union provided for a grievance procedure before an arbitrator; Mr. Parrett went through that procedure but the arbitrator ruled that he would not consider any evidence or information that arose after the date of Mr. Parrett's transfer to the uniformed division. The Seventh Circuit found that while the grievance procedure was in general adequate, "the particular proceeding in this case did not, in fact, satisfy those [due process] requirements." *Parrett*, 737 F.2d at 697. Contrary to the assertion in petitioners' brief (Br. 25) that *Parrett* stands for the proposition that "arbitration offends due process" when an arbitrator cannot award "full common law damages," the Seventh Circuit actually held:

> The problem here is not that union grievance machinery . . . is inherently inadequate, for it is not, but that as administered in the present case it could not protect the plaintiff's property right in his job as a police officer. *This is not to say that arbitration cannot satisfy the requirements of due process unless the arbitrator is empowered to award full common law damages.* But if he cannot, then he must be able to prevent the harm to the grievant before it occurs, which requires faster action than was taken by the arbitrator in this case.

Parrett, 737 F.2d at 697 (emphasis added). The police officer's rights in his job were protected by due process because the job had aspects of "property" and the employer was a public entity. The due process issue simply does not exist here, however, because petitioners have no property right in the manner of dispute resolution under the contract; the rights that the parties have here are limited to the ones spelled out in the contract. There is thus no conflict between the decisions of the Second and Seventh Circuits on this issue.

Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244 (9th Cir. 1994), considered the question – not present here – of whether parties can contractually reduce a statute of limitations and other rights contained in a remedial statute specifically enacted to redress the perceived unequal bargaining relationship between petroleum distributors and retail dealers. The Ninth Circuit found that Congress had enacted the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. §§ 2801-2806, to deal with the "disparity of bargaining power" between petroleum franchisers and franchisees. The Act specifically spelled out the forms of relief to which a franchisee like Graham Oil would be entitled if it proved certain claims, and it established a one year statute of limitations for the filing of such claims. The parties in *Graham* entered into a franchise agreement that contained an arbitration clause that, among other things, eliminated some of the damages otherwise allowed by the PMPA and provided that claims would have to be filed within 90 days. The district court ruled that Graham Oil was limited exclusively to the arbitration proceeding, but the Ninth Circuit reversed. It agreed that PMPA did not preclude the use of arbitration, but held that because the "arbitration clause employed by ARCO compels Graham Oil to surrender important statutorily-mandated rights afforded franchisees by the PMPA," it was not enforceable. *Graham*, 43 F.3d at 1248. The situation in *Graham* is totally different and easily distinguishable from the arbitration clause at issue here, and there is no conflict between the circuits as a result.

◆

CONCLUSION

The Second Circuit correctly found that the parties entered into a valid contract containing an enforceable arbitration clause that applies to the dispute at issue. The arbitration clause is well within the parameters that this Court has consistently upheld. There are no conflicts between the Second Circuit's ruling and any decisions of this Court or the circuit courts. For the foregoing reasons the petition for a writ of certiorari should in all respects be denied.

Dated: Hartford, CT, May 10, 2001

Respectfully submitted,

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③

Supreme Court, U.S.
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In The
Supreme Court Of The United States

October Term, 2000

◆

JEFFREY N. MEHLER AND MARY S. RUSSELL,
Petitioners

v.

THE TERMINIX INTERNATIONAL COMPANY, L.P.,
Respondent

◆

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

◆

BRIEF OF AMICI CURIAE OF THE STATE OF CONNECTICUT, FOUR STATES AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The *amici curiae* State of Connecticut and the states identified on the cover, by and through their attorneys general, respectfully submit this brief in support of the Petition for Writ of Certiorari of Jeffrey N. Mehler and Mary S. Russell.

The States have a strong interest in preserving the proper balance of power between federal and state governments. Our system of federalism, as explained by Justice Black,

> ...is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44-45 (1971).

Specifically, the States' interest is in opposing unwarranted federal encroachment upon state law governing the formation and enforceability of contracts, an area traditionally left to state regulation. The States view the preservation of state contract law as necessary to the protection of their citizens from abusive and unconscionable business practices which result in the unknowing or coerced surrender of important legal and constitutional rights, including the right to a jury trial.

Section 2 of the Federal Arbitration Act[1] (hereinafter "FAA") expressly reserves this role for the states as recognized by this Court. *Allied Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT DISREGARDED PRINCIPLES OF FEDERALISM TO EFFECT AN UNAUTHORIZED PREEMPTION OF STATE LAW

The Second Circuit erroneously applied the federal presumption of arbitrability in a manner which preempts state contract law and violates established principles of federalism.

A. Federalism Maintains a Critical Balance of Power Between Federal and State Governments

Our system of federalism embodies a dual sovereignty in which the states possess sovereignty concurrent with the federal government, subject only to the limitations imposed by the Supremacy Clause. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). It is a system which strikes a careful balance between the legitimate interests of both the federal and state governments. *Younger*, 401 U.S. at 44-45. This constitutionally mandated balance of power was adopted by the original framers of the Constitution in order to preserve our fundamental liberties and as a check on the abuse of government power. *Gregory*, 501 U.S. at

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[1] 9 U.S.C. § 2

458-459 ("In the tension between federal and state power lies the promise of liberty."), *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985).

B. Federal Power is Used to Preempt Areas of Traditional State Regulation Only Where Such Congressional Intent is Unmistakably Clear

While Congress has the authority, as long as it is acting within its defined constitutional powers, to preempt state law, it does not take this intrusion upon state authority lightly. *Gregory*, 501 U.S. at 460. This is true particularly in areas of traditional state regulation, such as the formation and enforceability of contracts, where this reluctance to encroach upon state powers is expressed as a judicial presumption against preemption. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). Accordingly, federal legislation will be applied to preempt state law in such traditional areas of state regulation only if the Congressional intent to do so is "clear and manifest." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994), *Gregory*, 501 U.S. at 461, *Atascadero*, 473 U.S. at 242-243.

C. The Second Circuit Disregarded Clear and Specific Congressional Intent to Preserve State Contract Law in Applying the FAA

A court cannot construe a federal statute to impinge on legitimate state interests without considering the effect of such a ruling on our federalist system. *BFP*, 511 U.S. at 544. It also is incumbent upon the federal courts to be certain of Congressional intent before determining that federal law overrides the existing balance of federal and state powers. *Gregory*, 501 U.S. at 460, *Atascadero*, 473 U.S. at 243. If there is any doubt about Congressional intent, principles of federalism require that the federal courts defer to traditional state regulation. *BFP*, 511 U.S. at 546.

In determining the intent of Congress, the courts must look to the express language of the statute "and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. TWA*, 504 U.S. 374, 383 (1992). "Preemption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the court's task is an easy one." *English v. GE*, 496 U.S. 72, 78-79 (1990).

Congressional intent in enacting § 2 of the FAA is unmistakably clear. This provision specifically preserves "such grounds as exist at law or in equity for the revocation of any contract" as a basis for invalidating arbitration clauses. Through this express language, Congress sought to limit its intrusion upon state authority and to carefully protect general principles of state contract law, an area historically regulated by the states. Accordingly, this Court has held that state contract law must be applied in determining whether there is a valid agreement to arbitrate the subject of a dispute. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), *Allied Bruce*, 513 U.S. at 281, *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

The Second Circuit erroneously determined that the parties should have been required to submit their dispute to arbitration based on the FAA's presumption in favor of arbitrability, "irrespective" of the construction of the parties' contract pursuant to state law. Petitioners' Appendix 13. The Second Circuit's view that this principle of federal law preempts the application of traditional state contract law is contrary to the Congressional intent set forth in the express language of § 2 of the FAA and contrary to the well established principles of federalism.

II. THE ARBITRATION CLAUSE CANNOT BE ENFORCED TO RESOLVE THIS DISPUTE UNDER WELL SETTLED PRINCIPLES OF STATE CONTRACT LAW

A. The Contract Was Not In Effect at the Time of the Wrongful Conduct By Terminix and, Therefore, Did Not Apply to the Dispute

The construction of the Terminix Termite Protection Plan (Petitioners' App. 42-47) which contains the disputed arbitration clause is governed by well established principles of state contract law. A contract must be construed to effectuate the intent of the parties which, in turn, must be determined from a fair and reasonable reading of the written words contained in the document. Where the language of the contract is clear and unambiguous, the contract must be given effect according to its terms. *Southeastern Conn. Regional Resources*

Recovery Authority v. Dept of Public Utility Control, 709 A.2d 549, 555 (Conn. 1998), *Lawson v. Whitey's Frame Shop*, 697 A.2d 1137, 1141 (Conn. 1997), *24 Leggett Street Ltd. Partnership v. Beacon Industries*, 685 A.2d 305, 311 (Conn. 1996). Where the plain meaning and intent of the language is clear there is no room for construction.[2/] *Levine v. Massey*, 654 A.2d 737, 740 (Conn. 1995), *Collins v. Sears, Roebuck & Co.*, 321 A.2d 444, 448 (Conn. 1973). A court cannot disregard the words of the parties or read into a contract by interpretation, a provision which is contrary to the express terms of the agreement itself. *Pesino v. Atlantic Bank of New York*, 709 A.2d 540, 546 (Conn. 1998), *Levine*, 654 A.2d at 740-741, *Collins*, 321 A.2d at 448.

The subject of the parties' dispute is the damage caused by Terminix during the application of termiticide to the Petitioners' residence on July 19th and July 24th, 1996. The Termite Protection Plan (Petitioners' App. 42) was signed by the parties on July 19th while the initial treatment work had yet to be performed. By its terms the Termite Protection Plan is a conditional service contract and guarantee which provides for future inspections and treatments for termite infestation and guarantees against future damage from such infestations. It contains a notice

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[2/] Even if the contract language were deemed ambiguous, it also is well established that, particularly in the case of form contracts, any such ambiguity must be construed against the interests of the drafting party, in this case, Terminix. *Streitweiser v. Middlesex Mutual Assurance Co.*, 593 A.2d 498, 500 (Conn. 1991).

that the agreement is contingent upon approval of the Terminix manager and that confirmation of the effective date will be forwarded after completion of the work and payment has been received.

Subsequent to the completion of the termite treatment work a written confirmation (Petitioners' App. 47) was issued by Terminix which identified the contract by number and stated that it began on August 1, 1996. These documents must be read together in determining the intent of the parties. *Mongillo v. Commissioner of Transportation*, 571 A.2d 112, 115 (Conn. 1990).

Since the damage which is the subject of the parties' dispute occurred during the application of the treatment in July and the contract expressly states that the contract does not begin until August 1, 1996, the contract does not apply to the dispute. Contrary to this explicit language, the Second Circuit reads into the contract a provision which makes the contract effective on July 19th. The Second Circuit's reading also renders superfluous the express contract language which creates certain conditions precedent. The completion of the treatment work, receipt of payment and managerial approval all had to be fulfilled before the contract could become effective and none had occurred on July 19th. The Second Circuit's tortured reading of the contract to import a new effective date is contrary to the express terms of the agreement and violates the fundamental state law principles of contract construction previously discussed.

B. The Arbitration Clause in the Termite Protection Plan is Unconscionable Under State Law

Connecticut courts have established that unconscionability, as a defense to the enforceability of a contract, is determined as a question of law, based on all of the relevant facts and circumstances of the case. *Cheshire Mortgage Service, Inc. v. Montes*, 612 A.2d 1130, 1135 (Conn. 1992); *Iamartino v. Avallone*, 477 A.2d 124, 128 (Conn. 1984). The purpose of the doctrine is to prevent oppression and unfair surprise. *Family Financial Services, Inc. v. Spencer*, 677 A.2d 479, 484 (Conn. 1996) (citing J. Calamari & J. Perillo, Contracts (3d Ed.) § 9-40). In determining whether contractual provisions are unconscionable, the courts have been guided by the principles set forth in Official Comment 1 to § 2-302 of the Uniform Commercial Code.

> The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.

Hamm v. Taylor, 429 A.2d 946, 949 (Conn. 1980).

In this case, the plaintiffs are ordinary consumers, trying to maintain and preserve their home, with no particular expertise regarding the application of termiticide or termite service plans. The Termite Protection Plan is a preprinted form. While the front of the form contains the signatures of the parties, the arbitration clause is located on the back of the form near the bottom of the page. (Petitioners' App. 43). Terminix would not have agreed to apply the termiticide if Mr. Mehler had not signed the Termite Protection Plan. The Terminix Inspection Graph (Petitioners' App. 44) showed that there was an ongoing termite infestation which had already caused damage to the residence. No other company contacted by Mr. Mehler would perform the necessary work. It is clear that Mr. Mehler had no meaningful opportunity to negotiate the terms of the standardized arbitration clause and had no choice but to sign the agreement. This is a typical contract of adhesion. See, *Aetna Casualty and Surety Co. v. Murphy*, 538 A.2d 219, 222 (Conn. 1988).[3/]

The terms of the arbitration clause are oppressive and unfairly surprise consumers. The clause does not set forth any of the arbitration procedures to be followed when a dispute arises, but merely incorporates by reference, the Rules of Commercial Arbitration of the American Arbitration Association. The significance of this reference may be understood by business persons who regularly enter into such contracts, but not by ordinary consumers.

[3/] In the case of consumer adhesion contracts, the presumption of arbitrability should not be routinely applied since there is doubt that a true agreement to submit issues to arbitration ever existed. Such arbitration clauses should be more closely scrutinized by the courts. *Williams v. Aetna Finance Co.*, 700 N.E.2d 859, 867 (Ohio, 1998); *Patterson v. ITT Consumer Financial Corp.*, 18 Cal. Rptr. 2d 563 (Cal. App. 1st Dist. 1993).

1. Waiver of right to jury trial

The arbitration clause is unconscionable because it results in the unknowing waiver of the Mehlers' right to a jury trial. In *L&R Realty v. Connecticut National Bank*, 715 A.2d 748, 755 (Conn. 1998), the court held that a jury trial waiver entered into in advance of litigation was enforceable only when there is clear evidence of an intent to waive that right.

The holding in *L&R Realty* did not specifically involve an arbitration clause, but rather, sets forth a principle of general applicability to any contracts which purport to waive this fundamental constitutional right. These factors were applied in *Norton v. Commercial Credit Corp.*, No. 98-0578441, 1998 WL 729700 (Conn. Super. Ct. Oct. 6, 1998) to invalidate an arbitration agreement which made no reference to the waiver of access to the courts or the right to a jury trial. The arbitration clause in the Terminix service plan, by failing to provide any notice whatsoever that consumers are waiving their right to a jury trial, unfairly surprised the Mehlers and is oppressive.

2. Access to the forum conditioned upon payment of an excessive filing fee

The Petitioners had no prior notice that the submission of a dispute to arbitration was conditioned upon the prepayment of a substantial fee. In this case, the fee to file the Mehlers' claim would be $7,000.00, exclusive of the AAA administrative fee and the arbitrator's daily fee.

Letter of November 26, 1997 from Martha Dean to Laura McNaughton, AAA Administrator (Petitioners' App. 80).

Such a financial burden, especially without effective prior notice, may deprive a party of access to the arbitral forum. In essence, the arbitration clause, by its terms, prohibits consumers from seeking redress through the judicial system, and then renders the arbitral forum inaccessible. In *Myers v. Terminix Int'l Co.,* 697 N.E.2d 277 (Ohio Ct. Com. P. January 27, 1998), the court struck down as unconscionable, a Terminix arbitration clause which is essentially the same as that found in the Mehlers' service plan. A similar clause was held to be unenforceable by the courts in both the *Patterson* and *Williams* cases, and in *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999).

III. IN CASES SUCH AS THIS, WHERE THERE IS NO MEANINGFUL CONSENT, THE IMPOSITION OF A MANDATORY ARBITRATION CLAUSE VIOLATES THE PUBLIC POLICY OF THE FAA

A. Federal arbitration policy is based on the enforcement of arbitration agreements which are voluntary

The central purpose of the Federal Arbitration Act, 9 USC § 1, et. seq., is to ensure that "private agreements to arbitrate are enforced according to their terms." *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 53-54 (1995) (quoting *Volt Information Sciences, Inc. v.*

Board of Trustees of the Leland Stanford Junior University, 489 U.S. 468, 479 (1989)). It was specifically enacted to overcome judicial hostility to private agreements to arbitrate and the long standing rule in equity which refused to enforce such agreements. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 220 n. 6 (1985) (quoting HR Rep. No. 96, 68th Cong., 1st Sess. 1-2, (1924)); *Southland Corp. v. Keating*, 465 U.S. 1, 12-14 (1984). Congressional intent was to place arbitration agreements on the same footing as other contracts. *Volt*, 489 U.S. at 474; *Byrd*, 470 U.S. at 219.

While federal policy recognizes that arbitration can be an expeditious means of dispute resolution, "this policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono*, 514 U.S. at 57. The consent of the parties has always been the cornerstone of the FAA. It does not mandate the arbitration of all claims but merely the enforcement of privately negotiated arbitration agreements.[4/] *Volt*, 489 U.S. at 474, 475; *Byrd*, 470 U.S. at 219-221 (the expeditious resolution of claims

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[4/] See 9 USC § 3 (on application of a party to an arbitration agreement court may stay federal court proceeding "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration *under such agreement*" (emphasis added)); 9 USC § 4 (on application of a party to enforce an arbitration agreement court may issue an order "directing that such arbitration proceed *in the manner provided for in such agreement*" (emphasis added)).

was deemed to be secondary to the Act's purpose of protecting the contractual rights of the parties).

> After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, ...but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms ....and according to the intentions of the parties ...."[citations omitted].

First Options of Chicago, Inc., 514 U.S. at 947. "Arbitration under the Act is a matter of consent, not coercion." *Mastrobuono*, 514 U.S. at 57, (quoting *Volt*, 489 U.S. at 479).

The element of consent was considered so crucial to the FAA that adhesion contracts, in which the voluntariness of the weaker party might be called into question, were thought to be entirely exempt from the coverage of the Act. Justice Black described the view expressed by certain members of Congress at that time:

> On several occasions they expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. He noted that such contracts "are really not voluntarily [sic] things at all" because "there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court ...." He was emphatically assured by the

> supporters of the bill that it was not their intention to cover such cases.

Prima Paint Corp. v. Conklin, 388 U.S. 395, 414 (1967) (Dissenting opinion, citing to Hearing on S 4213 and S 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9-11 (1923) and to Joint Hearings on S 1005 and HR 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 15 (1924)).

B. Mandatory binding arbitration lacks sufficient safeguards to protect the rights of consumers in the absence of meaningful consent

As this Court has previously observed, "the choice of forums inevitably affects the scope of the substantive right to be vindicated." *Alexander v. Gardner-Denver Company,* 415 U.S. 36, 56 (1974) (quoting *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 359-360 (1971)(Harlan, J., concurring)). In certain instances, this Court has found that the arbitral forum, because it is less protective of individual statutory rights, cannot provide an adequate substitute for the judicial process. *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (§ 1983 actions), *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act claim), *Alexander v. Gardner-Denver Company,* 415 U.S. 36 (1974) (Title VII action).

An arbitrator may have expertise in the operation of a particular business or in a specific commercial subject area but that does not guarantee the level of expertise required to resolve the complex legal issues that may arise in certain statutory actions. *McDonald*, 466 U.S. at 290, *Gardner-Denver*, 415 U.S. at 57. Some statutory questions can only be resolved upon review and consideration of volumes of legislative history and decades of administrative and legal rulings. *Barrentine*, 450 U.S. at 743. Even if the arbitrator has the knowledge to analyze complicated statutory legal claims, in most instances, he does not have the authority to do so since his authority is limited by the contract itself. If the arbitrator were to base his decision upon the requirements of the law rather than solely on the provisions of the contract, he would have exceeded the scope of his authority and the award would not be enforced. When there is a conflict between the rights guaranteed by statute and the provisions of the contract, the arbitrator must enforce the contract. *McDonald*, 466 U.S. at 290-291, *Barrentine*, 450 U.S. at 744, *Gardner-Denver*, 415 U.S. at 57.

> Moreover, the fact finding process in arbitration usually is not equivalent to judicial fact finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable ....and arbitrators have no obligation to the court to give their reasons for an award.

Gardner-Denver, 415 U.S. at 57-58.

Lastly, arbitrators are often powerless to grant a broad range of relief, once again because their authority is limited by the terms of the contract. This may likely result in the exclusion of certain categories of damages, costs and attorneys fees[5]. *Barrentine*, 450 U.S. at 744.\

In *Gardner-Denver* and its progeny this Court has refused to impute a consensual waiver of access to the judicial process where important statutory rights are involved, merely by submission of a dispute to arbitration. This is due at least in part to the inadequacy of arbitration procedures under the FAA to protect those rights. It is also clear that in such arbitration proceedings, the contract controls the scope of the issues and the power of the arbitrator. Whoever controls the contract controls the arbitration proceeding.

These reasons illustrate the dangers of arbitration clauses contained within preprinted form contracts of adhesion in consumer transactions such as the Petitioners'. Arbitrators familiar with the legal principles of commercial arbitration may have no familiarity with specific consumer protection statutes. Some consumer protection statutes, such as state unfair trade practices acts, are purposefully broad and cannot be interpreted or applied without reference to decisions of the Federal Trade Commission and an extensive body of administrative and judicial decisional law. The application of these remedial statutes,

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5/ The Terminix arbitration clause in this case excludes "indirect, special or consequential damages or loss of anticipated profits." Petitioners' App. 43.

often designed to level the marketplace between parties of unequal bargaining power, may be severely limited or even avoided by a well drafted arbitration clause, precisely because of the superior bargaining power of the business drafting the form contract.

To the extent that contract clauses purportedly waive statutory claims and remedies the arbitrator must give effect to the contract over the application of the consumers' statutory rights. If a contract does allow for the application of law by the arbitrator, and he misinterprets or incorrectly applies the law, there is no remedy for the disadvantaged party. Judicial review is extremely limited by the itemized grounds set forth in 9 U.S.C. § 10. It is well settled that errors of law are not a basis for vacating an arbitration award under the FAA.[6/] In fact, since the arbitrator is under no obligation to state the reasons for the award, meaningful judicial review of whether the arbitrator incorrectly applied the law, or ignored it altogether, is virtually impossible.

Lastly, since the arbitrator is limited to awarding the remedies in the contract, the business drafting a form

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[6/] See, e.g., *Flexible Mfg. Systems Pty. Ltd v. Super Products Corp.*, 86 F.3d 96 (7th Cir. 1996) (arbitrator's mistake in rejecting valid legal defense insufficient to vacate award), *Advest, Inc.v. McCarthy*, 914 F.2d 6 (1st Cir. 1990), *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742 (11th Cir. 1988), *Saxis Steamship Co. v. Multifacs Intl. Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967).

contract may preclude consumers from obtaining the full range of remedies otherwise available under the law.

CONCLUSION

For all of the foregoing reasons the State of Connecticut and the States named herein respectfully request that the Court grant the Petitioners' Request for a Writ of Certiorari.

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MAY 11 2001

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No. 00-1564

In the
Supreme Court of the United States

JEFFREY N. MEHLER AND MARY S. RUSSELL,
Petitioners,
v.
THE TERMINIX INTERNATIONAL COMPANY, L.P.,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF PROFESSOR ROBERT A. HILLMAN AND RISA MISH, CORNELL LAW SCHOOL, IN SUPPORT OF THE PETITION FOR CERTIORARI

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17pp

QUESTION PRESENTED

Whether the Second Circuit erred in holding that a consumer arbitration agreement governed by the Federal Arbitration Act that imposes an undisclosed $7,000 filing fee is enforceable where a conclusion that it is unenforceable is dictated by generally applicable principles of state contract law.

MOTION FOR LEAVE TO FILE ATTACHED BRIEF AMICI CURIAE

Robert A. Hillman, Edwin Woodruff Professor of Law at Cornell Law School, and Risa Mish, also of Cornell Law School, move for leave to file the attached brief *amici curiae* in support of the petition in this case. Petitioners consented to the filing of this brief. Respondent refused to consent to its filing, without explanation, making this motion necessary.

Robert A. Hillman is the Edwin Woodruff Professor of Law at Cornell Law School, concentrating on contract and commercial law over his twenty-six year teaching career. Professor Hillman has authored or co-authored five books and over forty articles on contracts and commercial law. Prior to teaching, Professor Hillman clerked for two federal judges and practiced law with the firm of Debevoise & Plimpton in New York City. Through his extensive research and legal writings on contract law and commercial law, and his teaching, Professor Hillman has dedicated himself to advancing the public's understanding of contract law. Risa Mish is director of Alumni Relations at Cornell Law School. She was formerly a partner at Collazo Carling & Mish LLP in New York City, where she represented corporations on issues that included breach of contract claims. Prior to that she clerked for a federal judge and practiced at Simpson Thacher & Bartlett in New York City. As members of the legal education community, *Amici* are dedicated to teaching the importance of upholding the rule of law under the U.S. Constitution, generally, and to teaching the importance of the role of general principles of contract law to our system of justice. Neither *Amici* is affiliated directly, or indirectly, with Petitioners.

By filing this brief, *Amici* wish to emphasize that the issues presented in this case are not limited to the facts at issue here but are of widespread importance to all parties who sign standard-form contracts. The unconscionability issue raised by Petitioners implicates the most fundamental principles of contract law applicable to determining a contract's enforceability. If courts operating under the Federal Arbitration Act may ignore these principles, as happened here, such decisions will lead toward the diminution of the rule of law and the protections it affords contracting parties such as Petitioners. Consumers, who are likely targets of oppressive arbitration clauses, have no protection against such terms except as exist under general principles of contract law. We wish to bring this broader perspective to bear on the Court's consideration of the case. Accordingly, *Amici* seek leave to file this brief *amici curiae*.

Respectfully submitted,

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Date: May 11, 2001

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INTEREST OF AMICI CURIAE[1]

Amici rely on the statement of its interest set forth in its attached Motion for Leave to File Brief *Amici Curiae.*

STATEMENT OF THE CASE

Amici rely on the Statement set forth in the Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

This Court should reverse the Second Circuit's decision here because, contrary to the express requirement of the Federal Arbitration Act ("FAA"), the court failed to apply long standing principles of state contract law that dictate nonenforcement of the arbitration clause at issue. Allowing the decision to stand may lead courts to adopt similar improper approaches that diminish the role of state contract law under the FAA and would maintain the split among the circuit courts created by the Second Circuit's decision on unconscionability here.

This Court has made clear that Congress expressly preserved the applicability of general principles of state contract law under the FAA. The Court has determined that in enacting the FAA Congress's purpose was to require courts to enforce the terms of the parties' agreements. The FAA expressly refers to the applicability of contract law principles that would render an agreement to arbitrate unenforceable.

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[1] In conformity with Supreme Court Rule 37, *Amici* state that counsel for Petitioner did not author the body of this brief but did prepare the Table of Authorities, Motion for Leave to File and cover pages and provided minor editorial comments. No persons or entities made a monetary contribution to the preparation and submission of the brief other than for printing costs, which were paid by Petitioners.

In Petitioners' case, the United States Court of Appeals for the Second Circuit failed to consider or apply three of the most basic principles of contract law governing a contract's enforceability: unconscionability; the rule established in Section 211(3) of the SECOND RESTATEMENT OF CONTRACTS; and the doctrine of reasonable expectations.

Even if the Second Circuit correctly determined that a contract with an agreement to arbitrate governed the initial treatment (a conclusion with which *Amici* disagree),[2] the three principles of contract law discussed in this brief dictate that the contract should not be enforced. *Amici* respectfully request that this Court reverse the Second Circuit as to the issue of unconscionabilty because it is at odds with the express directives of the FAA and contract law.

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[2] *Amici* disagree with the Second Circuit's holding that the arbitration clause applies to this dispute for the reason that the contract containing the arbitration clause "became effective" after the initial treatment that caused Petitioners' damages. *Amici* agree with the opinion of District Judge Thompson in this case. *Mehler v. The Terminix Int'l Co.*, 1998 WL 893149 (D. Conn. 1998). *Amici* also agree with Petitioners that the Second Circuit's approach effects an unauthorized preemption of state contract law; however, both the scope of the contract and preemption have been well-briefed by Petitioners and the latter issue is beyond *Amici's* specific expertise. This brief focuses on the issue of unconscionability. The discussion assumes that the Terminix arbitration clause applies to the events at issue simply for the purpose of this analysis.

ARGUMENT

The Federal Arbitration Act enforces "private agreements to arbitrate." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 54 (1995). The Act therefore presupposes an enforceable "agreement" between the parties to arbitrate and allows challenges to arbitrability based "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Principles of state law thus determine the "validity" of arbitration provisions. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). Based on three long-standing principles of state contract law – unconscionability, Section 211(3) of the Second Restatement of Contracts, and the doctrine of reasonable expectations – the arbitration clause here is unenforceable because the Mehlers never consented to arbitrate this dispute.

The Terminix "agreement" to arbitrate is contained within a form contract that is a classical contract of adhesion. Signing it involved a face-to-face meeting at the customer's home between an agent of Terminix and the Mehlers. The printed form presented to the Mehlers contains a few basic terms to be filled in by the parties, with the rest, including the arbitration provision, pre-printed by Terminix. In preparing the form, Terminix clearly planned to use it repeatedly and therefore invested time and money in preparing it. Customers such as the Mehlers have no familiarity with forms used in a one-time transaction. They reasonably understand that the agent could not and would not bargain over the form's pre-printed terms, including a pre-printed arbitration clause. In the Mehlers' case, they were unable to secure any other service and therefore had no alternative but to contract with Terminix. A customer who is asked to sign at his home a one page form contract for home services generally understands that the likelihood of a dispute is small and would not dream of the consequences that developed in this case. Customers weighing costs and benefits would reasonably conclude that the cost of engaging the professional services necessary to understand all of the implications of the home service form contract outweigh any benefits of doing so and would sign the form without comprehending the implications of the Terminix arbitration clause in the contract here.

Although standard form transactions such as this do not involve the back-and-forth bargaining envisioned by classical contract law, *Amici* do not contest the general enforceability of standard form contracts. Form contracts are widely used precisely because they provide significant savings to the provider of the form and possibly savings to the consumer. In brief, form providers standardize their risks and reduce bargaining costs by offering one set of terms to all users. *See* Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631-32 (1943); E. A. Farnsworth, CONTRACTS, § 4.26, at 296 (3d ed. 1999) ("because a judicial interpretation of one standard form serves as an interpretation of similar forms, standardization facilitates the accumulation of experience").

Providers may pass on some of the savings to consumers by lowering prices for the goods or services.

In light of the benefits of standard forms, courts generally and correctly enforce them. Nevertheless, the analysis cannot end here as it did with the Second Circuit's decision. Courts applying general principles of contract law must also focus on the potential for the form provider to include objectionable terms precisely because of the dynamics of standard-form transactions – the reasonable failure of the user to read the form, the lack of an opportunity to bargain over terms, the absence of reasonable alternatives for the consumer, etc. Applying state contract law, courts have readily stepped in when the form provider goes too far. In fact, the drafters of the revised Article 2 of the Uniform Commercial Code recently noted that "courts have been particularly vigilant when the contract at issue is set forth in a standard form." Proposed Amendments to Uniform Commercial Code Article 2 – Sales, American Law Institute Draft, Section 2-302, Preliminary Comment 1 (May 2001).

In sum, current state contract law creates a presumption of assent to negotiated terms and *reasonable* standard terms, with courts empowered to strike unreasonable or unfair clauses. Courts base their decision to strike a provision on one or more of the following three doctrines, the application of any one of which would render the arbitration agreement in this case unenforceable.

A. Unconscionability

Under the long-established unconscionability doctrine, courts strike contracts or terms in order to prevent "oppression and unfair surprise." *See, e.g.*, U.C.C. § 2-302, cmt. 1; *Waters v. Min. Ltd.*, 587 N.E.2d 231 (Mass. 1992). The doctrine allows courts to police unfair terms directly rather than covertly by manipulating other rules such as misrepresentation or duress. Generally, courts investigate the manner in which the parties entered the contract ("procedural unconscionability") and weigh the fairness of the resulting substantive terms ("substantive unconscionability").

Procedural unconscionability consists of a " 'lack of a meaningful choice, considering all the circumstances surrounding the transaction' including 'the manner in which the contract was entered,' whether each party had 'a reasonable opportunity to understand the terms of the contract,' and whether 'the important terms [were] hidden in a maze of fine print. . . .' " *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 998 P.2d 305, 325 (Wash. 2000) (*quoting Nelson v. McGoldrick*, 896 P.2d 1258 (Wash. 1995)). Because Terminix's agent presented the Mehlers with a take-it-or-leave-it preprinted form contract that did not reveal the costs or details of arbitration, but only incorporated the "Commercial Arbitration Rules" of the American Arbitration Association, the Mehlers never had a reasonable opportunity to understand the ramifications of agreeing to arbitrate, including the duty to pay a fee of $7,000 and additional expenses. The arbitration agreement was therefore procedurally unconscionable.

Substantive unconscionability encompasses terms that are manifestly unjust, "one-sided or overly harsh." *M.A. Mortenson,* 998 P.2d at 323 (*quoting Nelson,* 896 P.2d 1258). For example, a clause is unconscionable when it conflicts with public policy, denies a party substantially what she bargained for, or has no reasonable purpose. In one recent case, for example, a court found substantively unconscionable a mandatory arbitration provision and stated, "Barred from resorting to the courts by the arbitration clause in the first instance, the designation of a financially prohibitive forum effectively bars consumers from this forum as well; consumers are thus left with no forum at all in which to resolve a dispute." *Brower v. Gateway 2000, Inc.,* 676 N.Y.S.2d 569, 573 (A.D. 1998).

Here, Terminix's mandatory arbitration provision was substantively unconscionable because, by incorporating by reference the Rules of Commercial Arbitration of the American Arbitration Association, the provision would require the Mehlers to pay a $7,000 filing fee that effectively denies the Mehlers an opportunity to air their grievances concerning the catastrophic harm they have suffered. Generally, such strategies by form providers can only discourage consumers from pursuing their state law rights when form providers breach their contracts. In fact, other courts have already recognized the unconscionability of Terminix's arbitration clause. *Myers v. Terminix Int'l Co.,* 697 N.E.2d 277 (Court. Comm. Pleas of Ohio, 1998). This Court has also recognized that "large arbitration costs [can] preclude a litigant . . . from effectively vindicating . . . rights in the arbitral forum." *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79 (2000).

B. Restatement (Second) Section 211(3)

Section 211(1) of the Second Restatement of Contracts memorializes the traditional duty-to-read standard of contract law. *See* Restatement (Second) of Contracts § 211(1) (1979) ("where a party to an agreement signs or otherwise manifests assent to a writing, he adopts the writing as an integrated agreement with respect to the terms included in the writing"). In dismissing without discussion the Mehlers' unconscionability claim, the Second Circuit adhered to the duty-to-read principle without considering the substantial body of doctrine represented by Section 211(3): "Where the [form provider] has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." Applying Section 211(3) to the Terminix-Mehler contract, the issue is whether Terminix should reasonably have comprehended that the Mehlers would not have agreed to arbitration had they understood that they would have to pay a fee of $7,000 before any of their grievances relating to a catastrophic breach by Terminix would be aired. The answer is clearly that Terminix reasonably should have understood that the Mehlers would not have agreed to arbitrate under such conditions. The arbitration provision is therefore unenforceable under Section 211(3).

C. The Doctrine of Reasonable Expectations

The reasonable expectations doctrine, most prominent in insurance form-contract cases, but not limited to them, holds that

> [t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975) (*quoting Rodman v. State Farm Mut. Ins. Co.*, 208 N.W.2d 903, 906 (Iowa 1973)).

The doctrine is easily transferable to other types of standard forms, including the Mehler-Terminix contract. The principle authorizes courts to overturn express contract language if the term contradicts the form user's reasonable expectations. The doctrine therefore creates an affirmative duty on the part of the form provider to point out and explain reasonably unexpected terms even if they are stated in the contract. The doctrine reflects the reality that form users do not read their contracts and that they agree to be bound only to reasonable boilerplate. Applied here, the question is whether the Mehlers reasonably expected to have to pay $7,000 and other expenses in order to arbitrate a dispute over Terminix's calamitous negligence. Without any forewarning from Terminix concerning the ramifications of agreeing to arbitration, there is no reason why the Mehlers should have expected such an unfair result.

CONCLUSION

General principles of state contract law provide an excellent, workable solution to the problem of policing unbargained-for standard form contracts and to the issues raised here. The law presumes the general enforceability of standard forms, but it negates terms procured unfairly or that are reasonably unexpected because unjust or indecent. By enforcing the arbitration provision here, where the consequences of agreeing to arbitration were reasonably unexpected and unreasonable, the Second Circuit violated both the FAA's directive to apply state contract law as well as the outcome dictated by applicable contract principles concerning enforceability. In short, Petitioners never agreed to arbitrate on the contract's terms. The Second Circuit's decision should be reversed.

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